

Regal Recycling, Inc. and Local 813, International Brotherhood of Teamsters, AFL-CIO.¹ Cases 29-CA-16739, 29-CA-16870, 29-CA-16951, 29-CA-17056, 29-CA-17131, and 29-RC-8020

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN
AND BRAME

On May 17, 1994, Administrative Law Judge Steven Davis issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

1. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging seven employees because of their activities on behalf of Local 813. The Respondent contends that it did not discharge the employees, but lawfully laid them off until they could produce documentation demonstrating their eligibility under the immigration laws to work in the United States.⁴ We agree with the judge that the Respondent unlawfully discharged the employees.

The relevant facts follow. Employee Edgar Pineda contacted Teamsters Local 813 in late June 1992.⁵ On July 13, Local 813 representatives met with 13 of the Respondent's employees, and the employees signed authorization cards. Four days later, representatives of Local 813 informed the Respondent that they had obtained authorization cards from a majority of the Respondent's employees and requested that the Respondent sign a recognition agreement. Angelo Reali (Angelo), one of the

Respondent's owners, refused to sign the agreement, asserting that the Company already had a collective-bargaining agreement with Laborers Local 445.

After this discussion with the Local 813 representatives, Angelo and Supervisor David Rios interrogated several employees about whether they had signed authorization cards. Rios told some employees that he already knew who had signed cards. He further told Pineda that Angelo and Michael Reali (Michael), who was also an owner and the vice president of the Respondent, wanted to know who had contacted Local 813 and that they were angry.

About July 20, Rios held a meeting of all employees at which he presented Raphael Griffin, a representative of Local 445. Griffin informed the employees that they did not need to join Local 813 because Local 445 already represented them. The employees responded that they had never signed authorization cards for Local 445 or seen Griffin before that day.⁶ When employee Norman Ortega outspokenly criticized Local 445, he was called to the side of the room, where Angelo told him that he could lose his job for criticizing that Union. In the meeting, Griffin told the employees that Local 445 could secure raises and medical benefits for them, and that they could not sign cards for another union.

The following day, the employees went to the Respondent's office and informed Michael that they desired representation by Local 813 rather than Local 445. At a subsequent meeting called by the Respondent, Michael asked the employees why they had signed cards for Local 813, stated that he would close the facility if they selected that Union, and informed the employees that they would be required to show him proof the next day that they were entitled to reside and work in the United States.⁷

⁶ The judge found that the employees did not know that they were represented by Local 445 or entitled to benefits under a collective-bargaining agreement, the Respondent never complied with the terms of the agreement, and Local 445 never administered it. In addition, in response to union-security provisions of the agreement, the Respondent paid dues from its own funds directly to Local 445 on behalf of its employees, who of course had not authorized payroll deduction of dues. The judge found, based on the record, that Local 445 was not concerned with the working conditions of the employees, which were set unilaterally by the Respondent, and failed to otherwise enforce or service its contract with the Respondent. Thus, this case is factually distinguishable from *Henry Bierce Co.*, 328 NLRB No. 85 (1999), in which the union had no actual or constructive notice that the employer was not complying with the contract. In this case, on the other hand, Local 445 has never asserted that it lacked knowledge of the Respondent's noncompliance with the contract.

⁷ We adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by, inter alia, interrogating employees concerning their union activities, threatening to close the facility if the employees continued their union activities, and threatening to require its employees to produce documents to establish that they were legally in the United States. The judge stated that only employee Mario Ortiz testified that Michael threatened to close the facility. We note, however, that Pineda corroborated Ortiz' testimony regarding this threat. Pineda's testimony pertained to the meeting initiated by the employees, but the judge found it

¹ Local 445, Laborers International Union of North America, AFL-CIO intervened in Case 29-RC-8020. We correct the case caption to accurately identify the Charging Party.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We modify the Order to conform to the violations found and to our decisions in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995), enf'd. 134 F.3d 50 (1997), discussed below, and *Indian Hills Care Center*, 321 NLRB 144 (1996). We have substituted a new notice to conform to the changes in the Order.

⁴ The Immigration Reform and Control Act (IRCA), 8 U.S.C. §1324 et seq., requires employers to complete INS Form I-9 for each employee after reviewing documents produced by the employee showing identity and eligibility to work in the United States.

⁵ All dates are in 1992 unless otherwise indicated.

On July 28, the Respondent, in individual meetings, gave each of the seven discriminatees a letter stating in part:

[Y]ou have not produced the proper proof of residence that is required by the federal government which makes you eligible to work in the United States. . . . [W]e have no choice but to ask you to hold off from your employment until such time that the documents are brought into the office.

The discriminatees were unable to produce the required documents and the Respondent did not permit them to return to work.

The record shows, and the judge found, that the Respondent previously had not uniformly required employees to furnish proof of their authorization to work. Indeed, Michael testified that the Respondent would permit employees to begin work if they said that they had documents showing work authorization, and that the employees sometimes failed to produce the documents. The Respondent had not even requested documents from discriminatees Hugo Carillo, Edgar Pineda, or Julio Del Cid before July. Upon his hire, Nery Perez provided a marriage certificate, which is not among the documents listed by the Immigration and Naturalization Service (INS) Form I-9 as an acceptable demonstration of identity or work eligibility. The record shows that the Respondent requested documents from Mario Ortiz, who furnished a work permit. Joel Chinchilla was asked for identification, and he produced a green card. Neither Ortiz nor Chinchilla completed a Form I-9 as required by the INS.

As the judge found, the Respondent also did not consistently apply a policy of verifying eligibility even at the time when it discharged the discriminatees, purportedly for lacking proper authorization. Four employees who did not sign authorization cards for Local 813 remained at work after July 28, despite their failure to produce documents demonstrating their eligibility to work. Moreover, after the discharges new employees were hired without providing appropriate documents.

Two of the discharged employees were rehired in November, after Local 813 failed to receive a majority of votes in the October 30 election. Carillo returned to work after seeking assistance from Local 445 to obtain a work permit, although his application for the permit was still pending even at the time of the hearing in this proceeding. Ortiz, whose discharge the Respondent attributed to the expiration of his work permit, returned to the Respondent's facility initially with a document stating that his permit would be renewed and later with the renewed permit, but the Respondent failed to reinstate him.

consistent with testimony about the later meeting called by the Respondent.

Like Carillo, Ortiz was ultimately rehired following the intervention of Local 445.

Under the test set out in *Wright Line*,⁸ in order to establish that the Respondent unlawfully discharged the seven employees based on their union activity, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the Respondent's decision to discharge. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated anti-union animus.⁹ Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

Based on the above facts, we adopt the judge's conclusion that the Respondent unlawfully discriminated against the seven discharged employees based on their union activities. The General Counsel demonstrated that the seven employees were among those who signed authorization cards for Local 813 and informed Michael that they wished to be represented by that Union rather than Local 445. Thus, the Respondent was well aware of their support for Local 813. The Respondent reacted to the employees' union activity with a clear demonstration of antiunion animus, by threatening to close the facility and, in an unprecedented manner, demanding a mass production of work authorization documents.

In agreement with the judge, we further find that the Respondent has failed to show that it would have discharged the employees even in the absence of their union activity. The record does not support the Respondent's assertion that its enforcement of eligibility requirements under IRCA predated the employees' support for Local 813. Therefore, we reject the Respondent's contentions that it had already instructed the employees to produce their documents before the advent of their union activity and had distributed an undated letter in June requiring the documents.

We also reject the Respondent's argument that the employees were not discharged, but merely laid off until they could be employed in compliance with Federal immigration laws. Significantly, the Respondent's attempt at strict compliance with eligibility requirements as to these employees, though arguably proper under immigration law, was contrary to its practice both before and after these discharges, as well as to its contemporaneous treatment of employees who did not support Local 813. To undocumented employees, hired and allowed to continue to work without having to produce authorization papers, an employer's sudden demand for such papers, accompanied by a "layoff" until they are provided,

⁸ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir.1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 393-403 (1983).

⁹ *Wright Line*, *supra* at 1090.

clearly means a permanent, or at least long and indefinite, loss of employment. Moreover, the Respondent's failure to reinstate Ortiz upon presentation of his renewed work permit, until Local 445 intervened at his request, belies the Respondent's contention that its only concern was ensuring proper work authorization.¹⁰

For the above reasons, we conclude that the Respondent's discharge of the seven employees violated Section 8(a)(3) and (1).¹¹

2. The judge ordered the Respondent to offer the seven discriminatees immediate reinstatement with backpay. In *A.P.R.A. Fuel Oil Buyers Group*, supra, 320 NLRB 408, the Board considered the remedies appropriate for discriminatory discharges of employees on the asserted basis of their undocumented status, including whether an employee's ineligibility for employment affects the propriety of reinstatement and backpay. Recognizing that the Board may not order a remedy that would require an employer to violate IRCA, it found in *A.P.R.A.* that an employer's obligation to reinstate allegedly undocumented workers should be conditioned on their satisfaction of IRCA's normal verification requirements. In accord with the decision in *A.P.R.A.*, we shall modify the judge's recommended Order to condition the Respondent's reinstatement obligation on the discriminatees' production, within a reasonable time, of documents enabling the Respondent to meet its obligations under IRCA. We shall further modify the judge's recommended Order to provide that the Respondent pay the discriminatees backpay from the dates of their discharges to the earliest of the following events: their reinstatement by the Respondent, subject to compliance with the Respondent's normal obligations under IRCA, or their failure after a reasonable time to produce such documents.

3. The Respondent excepts to the judge's recommendation that the Board issue a *Gissel*¹² bargaining order to remedy the unfair labor practices. As an initial matter, we find no merit in the Respondent's arguments as to the violations themselves, or its contention that a bargaining order is not appropriate because 3 months passed between the alleged unfair labor practices and the election. In normal circumstances, the violations in this proceeding would prompt the Board to consider a *Gissel* remedy. However, as the Board recently recognized in *Wallace*

International de Puerto Rico,¹³ excessively long delay at the Board may render such a remedy unenforceable. Here, the delay at the Board exceeded even that in *Wallace*. As in *Wallace*, rather than engender further litigation and delay over the propriety of such an order, we find that the interests of the employees are better served by proceeding to a second election (in the event the tally of ballots from the first election shows that Local 813 has not received a majority of votes).

Although a *Gissel* remedy is not imposed, we find that, in the event that Local 813 has lost the first election, an additional remedy is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices and to ensure that a fair second election, if needed, can be held.¹⁴ Therefore, we shall in that event order the Respondent to provide Local 813, on request made within 1 year of the date of this Decision, the names and addresses of all current unit employees.¹⁵ The delay in this case, although unfortunate, was no more the fault of Local 813 or of the employees who were denied a fair opportunity to choose whether they desire union representation than it was of the Respondent. Our Order will afford Local 813 "an opportunity to participate in [the] restoration of employee rights by engaging in further organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion." *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1029 (1979), *enfd.* in relevant part 633 F.2d 1054 (3d Cir. 1980).¹⁶

¹³ 328 NLRB No. 3 (1999). In that case, the Board declined to issue a *Gissel* bargaining order and instead directed a second election given that the unjustified delay of the case at the Board for almost 4 years had likely rendered such an order unenforceable. Cf. *Garvey Marine, Inc.*, 328 NLRB No. 147 (1999) (Board found *Gissel* remedy appropriate, distinguishing *Wallace* based on the length of delay and extent and severity of the unfair labor practices involved).

¹⁴ See *Maramount Corp.*, 317 NLRB 1035, 1037 (1995) (Board has broad discretion to fashion a just remedy).

¹⁵ If Local 813 loses the pending election, Member Liebman believes that additional remedial measures are necessary to dissipate, as much as possible, the lingering atmosphere of fear created by the Respondent's unlawful conduct and ensure that employees will be able to exercise a free choice in a second election. Specifically, she would order the Respondent to grant Local 813 and its representatives reasonable access to the Respondent's bulletin boards and all places where notices to employees are customarily posted. Member Liebman also would order the Respondent to grant Local 813 reasonable access to its facility in nonwork areas during employees' nonworktime. In her view, these two access remedies would provide employees with reassurance that they can learn the benefits of representation by Local 813 free from the unlawful threats and reprisals they have experienced in the past. Given the judge's finding, adopted by the Board, that the Respondent violated Sec. 8(a)(2) by denying Local 813 access to its employees and facility, while providing such access to Local 445, these additional remedies are carefully tailored to the situation which calls for redress.

¹⁶ The Board has previously ordered this remedy in cases where it found that remedial measures in addition to the traditional remedies for unfair labor practices were appropriate. See, e.g., *Montfort of Colorado*, 298 NLRB 73, 86 (1990), *enfd.* in relevant part 965 F.2d 1538 (10th Cir. 1992); *United Dairy Farmers Cooperative Assn.*, 242 NLRB at 1030; *Haddon House Food Products*, 242 NLRB 1057, 1059 (1979),

¹⁰ See *Victor's Café* 52, 321 NLRB 504, 514-515 (1996) (employer's hasty demand, after learning of employee support for union, that employees produce documents demonstrating work authorization, and discharge of employees who failed to provide documents, violated Sec. 8(a)(3) and (1)). Like the Board in *Victor's Café*, we find that this case does not involve an employer's good-faith effort to come into compliance with its statutory obligations under IRCA without regard to its employees' union activities.

¹¹ We find it unnecessary to rely on *Future Ambulette*, 293 NLRB 884 (1989), and *Midwestern Mining*, 277 NLRB 221 (1985), cited by the judge.

¹² *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

ORDER

The National Labor Relations Board orders that the Respondent, Regal Recycling, Inc., Jamaica, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their activities on behalf of Local 813, International Brotherhood of Teamsters, AFL-CIO.

(b) Threatening employees with discharge for criticizing Laborers' International Union, Local No. 445, AFL-CIO.

(c) Threatening to require its employees to produce documentation to establish that they are legally in the United States in retaliation for union activities.

(d) Threatening to close the facility if the employees choose to be represented by Teamsters Local 813.

(f) Hiring additional employees in order to influence the outcome of the election.

(g) Denying Teamsters Local 813 access to its employees and facility, while providing access to Laborers' Local 445.

(h) Issuing a discriminatory warning to employee Edgar Pineda because of his activities on behalf of Teamsters Local 813.

(i) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, make a conditional offer of reinstatement to Maynor Lima Bobadillo, Hugh Carillo, Mario Carillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez, offering them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents, in order to allow the Respondent to meet its obligations under the Immigration Reform and Control Act of 1986.

(b) Make Maynor Lima Bobadillo, Hugh Carillo, Mario Carillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days of the date of this Order, remove from its files any reference to the unlawful discharges and warnings, and within 3 days thereafter notify the employees in writing that this has been done and that the

discharges and warnings will not be used against them in any way.

(d) In the event that Local 813 loses the pending election, supply Local 813, on its request made within one year of the date of this Decision and Order, the full names and addresses of current unit employees.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Jamaica, New York facility copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 23, 1992.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 29-RC-8020 is severed and remanded to the Regional Director of the purpose of opening and counting the challenged ballots of Hasan Abdool, David Baksh, David Gustman, Joel Macilla Chinchilla, Julio Del Cid, Nery Perez, and Edgar Pineda. Thereafter, the Regional Director shall prepare a revised tally of ballots. If the tally shows that Local 813, International Brotherhood of Teamsters, AFL-CIO has received a majority of ballots cast, the Regional Director shall issue a certification of representative; if the revised tally shows that Local 813 has not received a majority of the ballots, the Regional Director shall set aside the election and conduct a second election.

MEMBER BRAME, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent unlawfully interrogated its employees in violation of Section

enfd. in relevant part sub nom. *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1981); and *Loray Corp.*, 184 NLRB 557, 559 (1970).

This remedy is in addition to Local 813's right to have access to a list of voters and their addresses under *Excelsior Underwear*, 156 NLRB 1236 (1966), after issuance of a notice of second election.

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

8(a)(1). I reach this conclusion, however, by analyzing the interrogations based on the factors set out by the Second Circuit Court of Appeals in *Bourne v. NLRB*, 332 F.2d 47 (1964). I also agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) by discharging seven of its employees because of their support for Local 813. In addition, I agree with my colleagues' adoption of the judge's decision in all other respects, except for his recommendation to issue a bargaining order, which I join my colleagues in denying.¹ I dissent, however, with respect to the backpay remedy that my colleagues grant to the discriminatees, in view of their undocumented alien status at the time of their discharges. I also dissent concerning the majority's award of special remedies, which I find unwarranted.

1. The interrogations arose out of an organizing drive by Teamsters Local 813 at the Respondent's recycling facility.² Representatives of Local 813 met with the Respondent's employees on July 13, 1992,³ and the employees signed authorization cards for that Local. The Respondent claimed that the employees were covered by a collective-bargaining agreement with Laborers Local 445. The judge found that within days after the employees signed authorization cards for Local 813, these officials began extensive interrogations of employees as to who had contacted Local 813 and if the employees had signed cards. Employee Joel Chinchilla testified that shortly after he signed an authorization card, Rios told him that Angelo wanted to know which employee had called Local 813. Employee Julio Del Cid stated that 4 or 5 days after the July 13 card signing, Angelo, with Rios serving as translator, asked him if he had signed a card. Del Cid did not answer, and Angelo proceeded to speak with all of the other employees. The next day, Rios approached some employees, including Del Cid and Nery Perez, while they were eating, and stated that he knew that they had signed cards. The employees did not reply. Despite his assertion that he knew they had signed cards, Rios went on to ask the employees who had contacted Local 813 and who had signed cards. The employees said that they did not know.

Shortly after employee Hugo Carrillo signed his authorization card for Local 813, Rios began interrogating him about whether he had done so. Carrillo denied signing a card. After repeated questioning by Rios during the next 8 days, however, Carrillo finally admitted signing a card, because he believed that the Respondent would find out anyway.

¹ I agree with my colleagues that this case is factually distinguishable from *Henry Bierce Co.* 328 NLRB No. 85 (1999), in which I dissented as to the appropriateness of the bargaining order. I note, moreover, that in the present case the employees have the opportunity to express their desires concerning representation through an election.

² The facts regarding the interrogations of employees by supervisor David Rios and owner Angelo Realí (Angelo) are uncontested, because neither Rios nor Angelo testified.

³ All dates are 1992 unless otherwise indicated.

Beginning about July 20, Rios told employee Edgar Pineda that Angelo and his fellow owner Michael Realí (Michael) wanted to know who had contacted Local 813 and that they were angry. Pineda said that he did not know. Rios repeated his question to Del Cid, Chinchilla, and Carmello Calderon, who also asserted that they did not know. Rios continued his questioning of Pineda one or twice per week through August, and Pineda continued to claim not to have an answer.

On July 20, while these interrogations were ongoing, the Respondent called a meeting of its employees to inform them that they were already represented by a union, Local 445, and to introduce Local 445 representative Raphael Griffin. The employees had not previously known of this representation, a collective-bargaining agreement between the Respondent and Local 445, or the benefits to which the agreement entitled them. When employee Norman Ortega openly criticized Local 445 at the meeting, Angelo warned him that he could lose his job for such criticism. After the employees informed Michael that they preferred to be represented by Local 813, the Respondent convened another meeting with employees, at which Michael notified them that, if they continued to pay attention to Local 813, they would be required to bring in proof that they were eligible to live and work in the United States. The Respondent had previously been lax about requiring such documentation from its employees, many of whom were recent immigrants to this country. Ultimately, as the judge found, the Respondent discharged some of the employees who were unable to provide the requested proof.

In *Bourne*, supra, the Second Circuit recognized that interrogations of employees are not per se threatening, and identified five factors to be considered in determining whether an interrogation violated Section 8(a)(1). These factors are:

- (1) The background, i.e., is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e., how high was he in the company hierarchy?
- (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?
- (5) Truthfulness of the reply.⁴

⁴ Id. at 48. The Board cited the *Bourne* test with approval in *Rossmore House*, 269 NLRB 1176, 1177 (1984), aff'd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), in which the Board declared:

Our duty is to determine in each case whether, under the dictates of Sec[ti]on 8(a)(1), such interrogations violate the Act. Some factors which may be considered in analyzing alleged interrogations are: (1)

Applying these factors to the interrogations by Rios and Angelo, I conclude that the interrogations violated Section 8(a)(1). Regarding the background, here the Respondent maintained a sham collective-bargaining relationship with Local 445, and did not provide employees benefits included in its alleged collective-bargaining agreement with that Union. Moreover, the Respondent committed serious unfair labor practices, including threats of job loss and closing, and mass discriminatory discharges, when the employees demonstrated support for Local 813.

The information sought in the interrogations clearly tended to convey to employees that the Respondent intended to retaliate against individual employees. Angelo and Rios asked employees specifically whether they signed authorization cards, which could indicate their support for Local 813, and who had contacted that Union. Although such an inquiry, standing alone, might not tend to be coercive, Rios additionally told some employees that Angelo, or Angelo and Michael, wanted to know, and further informed Pineda that Angelo and Michael were angry. In addition, during the same period when the interrogations were taking place, Angelo warned Ortega that he could lose his job for criticizing Local 445, and Michael, in a meeting of employees, also threatened that if they continued their support of Local 813 they would have to produce documents showing that they were legally in this country. Thus, the employees would reasonably conclude that they risked discharge or other adverse action if they supported that local.

The interrogations were conducted by supervisor Rios and by owner Angelo, who represented the highest echelon of the company hierarchy. Although the questioning took place at the employees' work stations and in their break area, the questions were asked pointedly and repeatedly over the course of a number of weeks. The employees consistently denied knowing who had called Local 813 as well as signing authorization cards. Only Carrillo, after several interrogations, admitted signing a card because he believed that the Respondent would find out anyway. The Respondent's continual return to the subject of whether the employees had signed cards would tend to make reasonable employees think that the Respondent intended to retaliate against them for doing so. The employees' uniform reaction of concealing their own union activity and denying knowledge as to who had called Local 813 illustrates their fear that the Respondent would retaliate if it learned the truth. Based on all of these factors, I conclude that the interrogations by Rios and Angelo were coercive and therefore unlawful.

the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation.

Rossmore House, supra at 1178 fn. 20. See also *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985) (*Rossmore House* standards apply to questioning of employees who are not open union supporters).

2. Although, like my colleagues, I find that the Respondent acted unlawfully by discharging seven employees after they failed to present proof of their authorization to work legally in the United States, I do not agree with the backpay remedy ordered by the Board in *A.P.R.A. Fuel Oil Buyers Group*⁵ and by my colleagues in this case. In my view, and in agreement with Member Cohen's dissent on this point in *A.P.R.A.*, the discriminatees are not entitled to backpay except for periods for which they can establish their eligibility to work legally in the United States.

At the time of their discharges, the seven employees in this proceeding were unable to comply with the Respondent's requirement that they furnish documents demonstrating their legal authorization to work. The General Counsel acknowledges in his brief that the discriminatees were undocumented aliens when they were discharged, and that it is unknown whether they remain undocumented. The record shows only that the Respondent permitted two of the employees to return to work, at the urging of Local 445 and after they produced documents accepted by the Respondent.⁶

The Supreme Court held in *Sure-Tan v. NLRB*⁷ that "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." In *Del Rey Tortilleria v. NLRB*,⁸ the Seventh Circuit, relying on *Sure-Tan*, determined that in such cases the burden is on the employee "to present evidence that he [was] lawfully present and eligible for employment" during the backpay period. The court found that this rule followed logically from the elementary principle that "an alien who had no right to be present in this country at all, and consequently had no right to employment, has not been harmed in a legal sense by the deprivation of employment to which he has no entitlement."⁹

This principle, that undocumented workers suffer no legal injury by losing employment for which they are not eligible, provides, in my view, the proper benchmark for the Board's backpay remedies for alleged or admitted undocumented alien discriminatees, because it remedies violations of the Act without disregarding Federal immigration statutes and the important policies underlying them. Not only does an award of backpay to an undocumented worker bestow upon him the rewards of a job for which he is ineligible, but it also clearly operates

⁵ 320 NLRB 408 (1995), enf'd. 134 F.3d 50 (2d Cir. 1997).

⁶ I agree with my colleagues, for the reasons they articulate, that the reinstatement of these employees, with the assistance of Local 445, does not demonstrate that the discharges were based on a bona fide desire on the part of the Respondent to verify work eligibility, rather than on the employees' support for Local 813.

⁷ 467 U.S. 883, 903 (1984).

⁸ 976 F.2d 1115 (7th Cir. 1992).

⁹ Id. at 1119, quoting *Office Workers Local 512 v. NLRB*, 795 F.2d 705, 725 (9th Cir. 1986) (Beezer, J., dissenting in part).

against the Congressional purpose of controlling unauthorized immigration by firmly closing the workplace door. In one stroke, the remedy given by the majority provides a windfall to the individual who has entered the country and worked illegally, as well as an incentive to others to follow the same path. A more appropriate balance between remedying unfair labor practices and promoting compliance with immigration law and policy would be achieved, in my view, by ordering backpay to discharged discriminatees only for periods for which they can demonstrate that they were legally authorized to work in the United States. I would issue such an order in this proceeding.

3. Contrary to my colleagues, I do not find that special remedies are warranted in this case, either to eliminate the effects of the Respondent's violations or to ensure a fair second election. I do not find that requiring the Respondent to provide employee names and addresses to Local 813 is necessary as an alternative to a *Gissel* bargaining order where, as here, excessive delay at the Board may render a bargaining order unenforceable.¹⁰ In fact, the circumstances that militate against the *Gissel* order typically also disfavor the award of other special remedies. In the present case, the passage of 7 years since the violations renders unrealistic and speculative any conclusion by the Board as to whether there remain any "lingering effects" that require a special remedy.

Moreover, with respect to the objective of ensuring a fair second election, the special remedy of providing employee names and addresses to Local 813 is not well tailored to the circumstances of this case. The bargaining unit involved is small, consisting of fewer than 20 employees. In addition, the record clearly demonstrates that, despite the Respondent's unlawful denial of access to employees on its premises, Local 813 had ample opportunity for personal contact with employees. The Respondent's facility is a garage-like structure directly abutting the public sidewalk, and its offices are located in a separate building on the same street. Thus, employees are easily accessible to union organizers in the public area outside the Respondent's premises. In fact, Local 813 representatives met with employees frequently on an impromptu basis prior to the first election. Therefore, employee names and addresses are not necessary in order to provide Local 813 a method of identifying and establishing contact with unit employees.

¹⁰ The Board has granted this remedy in other recent decisions in which it declined to issue a *Gissel* bargaining order. See *Wallace International de Puerto Rico*, 328 NLRB No. 3 (1999); *Cooper Hand Tools*, 328 NLRB No. 21 (1999); *Comcast Cablevision of Philadelphia*, 328 NLRB No. 74 (1999). Participating in *Comcast*, I found the special remedy unjustified in the circumstances of that case.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees concerning their activities on behalf of Local 813, International Brotherhood of Teamsters, AFL-CIO.

WE WILL NOT threaten employees with discharge for criticizing Laborers' International Union, Local No. 445, AFL-CIO.

WE WILL NOT threaten to require employees to produce documentation to establish that they are legally in the United States in retaliation for union activities.

WE WILL NOT threaten to close the facility if our employees choose to be represented by Teamsters Local 813.

WE WILL NOT hire additional employees in order to influence the outcome of the election.

WE WILL NOT deny Teamsters Local 813 access to our employees and facility, while providing access to Laborers Local 445.

WE WILL NOT issue a discriminatory warning to employee Edgar Pineda because of his activities on behalf of Teamsters Local 813.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, make a conditional offer of reinstatement to Maynor Lima Bobadillo, Hugh Carillo, Mario Carillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez, offering them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents, in order to allow us to meet our obligations under the Immigration Reform and Control Act of 1986.

WE WILL make Maynor Lima Bobadillo, Hugh Carillo, Mario Carillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez whole for any loss of earnings and

other benefits suffered as a result of their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and warnings of Maynor Lima Bobadillo, Hugh Carillo, Mario Carillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and warnings will not be used against them in any way.

WE WILL, in the event that Local 813 loses the pending election, supply Local 813, on its request made within 1 year of the date of this Decision and Order, the full names and addresses of current unit employees.

REGAL RECYCLING, INC.

James Kearns and Laura Kriteaman, Esqs., for the General Counsel.

Gary Cooke, Esq. (Horowitz & Pollack, P.C.), of South Orange, New Jersey, for Regal.

Joseph Scantlebury, Esq. (Eisner, Levy, Pollack & Ratner, P.C.), of New York, New York, for Local 813.

Larry Cole, Esq. (Cole & Cole, Esqs.), of South Orange, New Jersey, for Local 445.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on charges and amended charges filed by Local 813, International Brotherhood of Teamsters, AFL-CIO (Local 813), an amended consolidated complaint was issued against Regal Recycling Company, Inc. (Regal or Respondent) on March 31, 1993.¹

The complaint alleges essentially that Respondent interrogated its employees concerning their activities in behalf of Local 813, and concerning whether they had appropriate immigration papers, because of their activities in behalf of Local 813; created the impression that its employees' activities were being kept under surveillance; offered and promised employees money as an inducement to abandon their support for Local 813; threatened its employees with discharge if they could not produce valid immigration papers, and threatened an employee with discharge for having made a disparaging remark concerning Local 445; informed its employees that they must produce immigration papers, thereby impliedly threatening them with unspecified reprisals; informed its employees that they already had a union, and that they should not join Local 813; threatened

its employees with the close of the business and cessation of operations; offered and promised its employees benefits if they accepted Local 445, and voted for it in the Board election; granted Local 445 unrestricted access to its facility and employees, for the purpose of campaigning and discussing issues related to a Board election, while denying agents of Local 813 such access for such purposes; used its car to attempt to run over an agent of Local 813; hired about 15 employees to artificially increase and pack the size of the voting unit for the purpose of influencing the results of the election; threatened its employees with discharge if they did not vote for Local 445; prevented an employee from voting in the election by directing him to leave the voting area prior to casting a ballot; and physically assaulting an employee, and imposed more arduous and less desirable conditions of employment on him.

The complaint also alleges that Respondent discharged seven named employees on July 28, 1992, and issued warnings to another employee, Edgar Pineda, and thereafter discharged him on December 10, 1992.

The complaint further alleges that Respondent unlawfully refused to recognize and bargain with Local 813, pursuant to its demand for recognition, and alternatively requests a bargaining order remedy based on Respondent's serious and substantial unfair labor practices which preclude the holding of a fair election.

On March 12, 1993, the Regional Director issued a report on objections and challenges, consolidating for hearing the unfair labor practice cases, discussed above, with objections, filed by Local 813, which essentially parallel the alleged unfair labor practices. At an election conducted on October 30, 1992, of the 32 eligible voters, 4 votes were cast for Local 813, 2 votes were cast for Local 445, 1 vote was void, and 24 ballots were challenged. Those 24 determinative challenged ballots were also consolidated for hearing.

Respondent's answer denied the material allegations of the complaint, and on May 5, 6, 7, 10, 20, and 21, and on June 14, 1993, a hearing was held before me in Brooklyn, New York.

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel, Local 813, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, having its office and place of business at 172-06 Douglas Avenue, Jamaica, New York, has been engaged in the operation of a recycling transfer station at which it sorts various recyclable materials and then transports them to various facilities to be recycled. During the past year, Respondent has purchased and received at its Jamaica facility fuel, machinery, recyclable materials, and other products valued in excess of \$50,000, directly from points outside New York State.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits, and I also find that Local 813 and Local 445 are labor organizations within the meaning of Section 2(5) of the Act.

¹ The docket entries are as follows: The charge in Case 29-CA-16739 was filed on July 23, 1992. The charge in Case 29-CA-16870 was filed on September 28, 1992. The charge and first amended charge and second amended charge in Case 29-CA-16951 were filed on October 26 and November 16, 1992, and January 28, 1993, respectively. The charge and first amended charge and second amended charge in Case 29-CA-17056 were filed on December 18, 1992, and January 8 and 28, 1993, respectively. The charge in Case 29-CA-17131 was filed on January 28, 1993. Respondent's answer denied knowledge or information as to the filing and service of the charges. The charges bear proper filing stamps. Original return receipts received in evidence show proper service on Respondent. A consolidated complaint was issued on September 30, 1992, and an order further consolidating cases, consolidated complaint and notice of hearing was issued on February 26, 1993.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Organizational Campaign of Local 813

Respondent operates a garbage transfer station at which garbage trucks dump garbage, which is then spread by Respondent's heavy machinery. Employees then pick up recyclable materials and sort them into appropriate containers.

In about late June 1992,² employee Edgar Pineda contacted Local 813, and expressed interest in joining that union. A meeting took place on July 13 at a park nearby Respondent's shop. Present were Local 813 Vice President and Delegate James Murray, and Jerome Jackson, business agent, and employees Maynor Lima Bobadillo, Carmelo Calderon, Hugo Carrillo, Luis Carrillo, Mario Carrillo, Helbert Chinchilla, Joel Mancilla Chinchilla, Julio Del Cid, Dario Garcia, Norman Ortega, Mario Ortiz, Nery Perez, and Edgar Pineda.

The union agents distributed authorization cards to the employees. The cards designated Local 813 as their collective-bargaining representative. The 13 employees read and signed the cards, and returned them to Agent Jackson.

On July 17, Local 813 Agents Jackson and Murray went to the office of Royal Carting, a company owned by the principals of Respondent, and located on the same block as Respondent. Jackson was familiar with Royal as Local 813 has a collective-bargaining agreement with that company. Respondent does not have an office on its premises, and the principals of Respondent use Royal's office as their office. The owners of Respondent are Angelo Realí, Michael Realí II, Paul Realí Jr., and Theresa Realí.

The union agents met Angelo, Paul, and Pete Realí, presented them with a recognition agreement, and told them that they had signed authorizations from a majority of Regal's employees. Angelo refused to sign the recognition agreement, saying that the Employer already had an agreement with Local 445. Murray began to show photocopies of the cards to Angelo Realí, and he believes that Realí saw the first two—Ortega and Pineda. Realí then told the two agents to get off his property.

B. Respondent's Response to the Organizing Drive

1. The alleged interference

a. Respondent's contacts with employees

Employee Joel Chinchilla testified that shortly after he signed a card for Local 813 on July 13, a supervisor named Ronald asked him if he signed a card for Local 813, and asked other workers who called the Union and why they did so. Chinchilla denied knowing anything about the Union, and the other employees denied knowing who called the Union.³ Chinchilla also stated that admitted Supervisor David Rios told them that Angelo wanted to know who called the Union.

Employee Julio Del Cid testified that about 4 to 5 days after the workers signed cards for Local 813 he was asked by Angelo, through translator and Supervisor Rios, if he signed a card. Del Cid did not reply. Del Cid stated that Angelo then spoke with all the other employees.

Del Cid further stated that the following day Rios approached certain employees while they were eating and told

them that he knew that they had signed cards. The employees did not respond. Employee Nery Perez stated that Rios told them that he already knew who had signed cards, but then asked those present who called the Union and who had signed cards for it. The workers replied that they did not know.

Employee Pineda testified that on about July 20, 1 week after the workers signed cards for Local 813, Rios began telling him that Angelo and Michael Realí wanted to know who called Local 813, and that they were angry.⁴ Pineda replied that he did not know who called the Union. Pineda heard Rios ask the same question of employees Carmelo Calderon, Julio Del Cid, and Joel Chinchilla. They also professed ignorance. Pineda further testified that Rios asked him that question once or twice a week, from that time through August. Pineda continued to deny knowing who called Local 813.

Employee Joel Chinchilla testified that Rios asked him who called the Union, saying that he was inquiring because Angelo wanted to know. He did not testify that Rios said that the bosses were angry.

Employee Hugo Carrillo first testified that he did not speak to any managers regarding his signing a card for Local 813. Then he testified that after he signed a card for Local 813, Rios continuously asked him whether he signed such a card and he denied doing so. Finally, about 8 days after he signed the card, Rios again asked if he signed the card, and Carrillo admitted doing so. Rios did not say anything in answer.

The Meeting with Local 445

At about that time, on about July 20, Rios gathered all the employees for a meeting with Raphael Griffin, a Local 445 representative. Pineda testified that Griffin told the workers that they did not have to join Local 813 because they were already members of Local 445. Pineda answered that Griffin was wrong because he had never signed a card for Local 445, and that there was never a union in the shop. The other workers said the same thing.

Employee Joel Chinchilla testified that at that meeting, Angelo, Michael, and Peter Realí were present. He essentially corroborated Pineda's version of the meeting, but added that employee Norman Ortega was outspoken thereat, telling those assembled, in Spanish, that he once worked at a Local 445 shop, and that that union was not helpful, adding that when he was discharged Griffin avoided him. Chinchilla observed Angelo asking Rios what Ortega was saying. Shortly thereafter, Ortega was called to the side, and Angelo said something to Rios. During the rest of the meeting Ortega remained silent.

Employee Mario Ortiz essentially corroborated Ortega's comment at that meeting, and stated that he overheard Angelo telling Ortega that Ortega could lose his job for criticizing Local 445.⁵

⁴ Respondent argues that Pineda's testimony must be discredited because he first testified that following the July 13 meeting, he did not speak to any manager concerning Local 813, nor did he speak with Rios about the Union. I reject this contention. Pineda testified through a Spanish interpreter, and there apparently was some confusion due to that. I credit Pineda's testimony in this regard. He gave testimony which was consistent with other employees' testimony concerning material subjects. In addition, his quote, *infra*, of Michael Realí that employees should think with their "hearts and minds" was admitted by Realí.

⁵ I do not agree with Respondent's argument in brief that Ortiz' affidavit statement, that Angelo Realí told Ortega that "he could even fire

² All dates hereafter are in 1992 unless otherwise stated.

³ I make no findings concerning this conversation with Ronald. There was only vague testimony concerning Ronald's supervisory status.

Employee Nery Perez testified that Griffin told them that Local 813 would not keep the promises it was making to the workers, and that the employees should not think of joining Local 813 because Local 445 represented them. When asked why the workers did not see Griffin before this, Griffin blamed Respondent.

Employee Del Cid testified that at that meeting, at which only Angelo was present, Griffin told the men that he could obtain raises and health benefits for them. Employee Hugo Carrillo asked Griffin where he was when Carrillo was sick, and needed the Union's help. Angelo asked Rios what Carrillo was saying, and upon being told, told Carrillo that he could have asked Angelo for the money for a doctor's visit. Del Cid further stated that he saw employee Ortega speak but he could not recall what he said.

Employee Del Cid further testified that Griffin told the employees that Local 445 had a contract with the Employer, and that Local 445 could obtain medical benefits for the men. He told them that they could not sign a card for another union. Del Cid asked Griffin why he was at the shop then and not before. Griffin answered that it was the owner's fault for not advising the union earlier that these workers had been hired.

The Meeting with Michael Realí

Local 813 Agent Jackson testified that on July 21 he was outside Regal's premises and was asked by the workers to accompany them as they had decided to meet with the owners. He walked with all the card signers to Regal's office.

Joel Chinchilla testified that the workers requested the meeting because they no longer wanted to lie to the Realis about their interest in Local 813. Chinchilla testified that the men told Rios to tell Michael Realí that they wanted to become members of Local 813, and that they did not want Local 445. Michael shrugged his shoulders, told the men that that was not a party, and that they must return to work.

Jackson testified that Pineda and Luis Carrillo told Paul and Peter Realí that the men wanted nothing to do with Local 445, and that they wanted the owners to deal with Local 813. According to Jackson, Paul said that he would take it into consideration. The men then returned to work.

Pineda testified that only Michael Realí was present at the meeting, and that Paul and Peter were not present. According to Pineda, Michael told the men that they already had Local 445, and reminded them that he helped many of them by lending them money, and told them that Regal could not pay Local 813's benefits if that Union was selected. Michael added that if Local 813 was selected, he would close the shop because he couldn't afford to pay the Union's benefits. Michael also told them to think hard with their "hearts and minds" as to what action they intended to take. All the assembled workers told Michael that they wanted to become members of Local 813.

One or 2 days later, Jackson visited Regal's office, and told Paul Realí not to let this matter "get out of hand." Jackson suggested that Realí call Martin Adelstein, the secretary-treasurer of Local 813, and perhaps they could work something out with Local 1034, a sister union to Local 813, resolving the matter by perhaps having the employees be represented by Local 1034.⁶

him for having said such a thing," is inconsistent with his hearing testimony.

⁶ I reject Respondent's argument that this statement indicated that Local 813 had no interest in representing the employees, and was there-

The Meeting Called by Respondent

Employee Joel Chinchilla testified that Rios gathered the employees for a meeting. Angelo and Michael Realí were present. Michael told them that "we are like family to you." He asked the workers to remember all the favors the Company did for them, such as lending money to them. He told them to think carefully with their hearts and minds, and not to do anything that would be contrary to the employees and the Company. He asked them why they wanted Local 813, and also told them that they would have to bring in proof that they were in the United States legally.

Employee Hugo Carrillo testified that at that meeting, Michael told them to think with their heads and hearts because they were a family. He reminded them that Respondent had lent money to the employees, and gave them turkeys. He told them that they already had a union, Local 445, and that they would have benefits. Michael added that they would need a green card to continue working. He asked why they signed cards for Local 813, and no one responded. Carrillo stated that Michael said nothing negative about Local 813. It should be noted that Carrillo first testified that he did not speak with any managers regarding Local 813.

Employee Mario Ortiz testified that at that meeting, Michael Realí told the workers that they are a family. He asked them to think with their heads and hearts about what they were doing, adding that if they continue, he could close down the shop. Michael did not speak about their signing cards. He said that he needed to see work permits or green cards by the following day. It should be noted that Ortiz stated that no managers spoke to him regarding Local 813, specifically stating that neither Michael nor Angelo Realí spoke to him about that union.

Del Cid also testified that about 1 week after the employees signed the cards for Local 813, they were summoned by Rios to a meeting with Angelo and Michael Realí at the office. Michael told them that what they were doing is wrong. He asked them to think what they are doing and whether they want to "be with us or 813." He then told them that they would have problems, and that if they "pay attention" to Local 813, he would ask for their "papers," and "green card." He further advised them not to pay attention to Local 813, which he called "bad," and predicted that Local 813 would only make promises to them without helping them. Michael Realí reminded them that Respondent had helped them in the past by giving them turkeys on Thanksgiving Day. Del Cid recalled that employees spoke at that meeting, but he could not recall what they said.

Employee Nery Perez testified that at that meeting, Michael told them to think what they are doing—think with your mind and heart. He reminded the workers they Respondent had been good to them, by giving turkeys at Thanksgiving, and making loans when needed. Michael said that the Company is their friends and that what they were doing was wrong, like taking their food from them. The employees did not respond.

Respondent's vice president, Michael Realí, testified that only one group meeting was held with employees. He stated that in July it came to his attention that the men were not working conscientiously as they had in the past, but were sitting and talking, and not paying attention to their work, which was dangerous with such heavy machinery. He asked Rios to call all the workers to his office.

fore not entitled to a bargaining order. Nothing came of the conversation, and Local 813 continued to represent the workers.

Realí stated that at the meeting he told the men that whatever was going on was disrupting his business. He told them that he had always treated each employee as a family member. He told them that if they think with their minds and hearts, they would make the right decision concerning “whatever is going on as far as activity and whatever causing them to deter them from work.” He told them to do whatever they wanted, but that whatever their decision was, they should just get back to work. Realí denied mentioning either Local 813 or 445. He further denied that anyone asked any questions at the meeting, and there was no mention of Thanksgiving turkeys.⁷ Realí also denied threatening anyone with discharge, or promising any benefits.

b. The alleged attempt to run down a Local 813 agent

The complaint, as amended at the hearing, alleges that in October 1992, a member of the Realí family, first name unknown, in the presence of employees, used his car to attempt to run over an agent of Local 813.⁸ Business Agent Jackson testified that he was at Respondent’s premises frequently since he represented employees at other companies, located on the same block, who were represented by Local 813. He stated that each time he walked on the sidewalk in front of Regal, he was followed closely by one of the owners, and told by them to get off their property.

Jackson stated that one day he stood on the sidewalk in front of Regal’s premises with his back to the street. As he spoke to a contractor who was repairing the sidewalk, suddenly the contractor grabbed him and pulled him out of the driveway. At that moment a Jeep pulled into the driveway, nearly hitting Jackson. The driver told Jackson that he was standing in an active driveway. Jackson threatened him with violence, and the incident ended. Jackson stated that he saw Regal’s employees standing at the door. He could not identify them, and no employee testified that they saw this incident. The contractor was not identified and was not called to testify.

Jackson stated that he did not know the driver’s identity, but he believes that he is one of the Realí “boys,” who he saw many times at the Realí’s office, but with whom he transacted no business. Jackson stated that he recognized the Jeep, which was always parked in front of the office.

Analysis and Discussion

Alleged Interference with Employees

Based on the uncontradicted testimony of Local 813 agents Jackson and Murray, I find that on July 17, Respondent possessed knowledge of its employees’ activities in behalf of Local 813. On that date, the two union agents told Respondent’s officials that a majority of their employees had signed cards for that union.

The Interrogations of Employees

The evidence also supports a finding that within a few days of Respondent’s becoming aware that its employees had engaged in union activities, Supervisor Rios engaged in extensive interrogation of the workers. Thus, employees Joel Chinchilla, Perez, Pineda, and Hugo Carrillo testified, and I find, that Rios asked them if they called the Union or if they signed a card for

Local 813. Further, Perez and Pineda testified that they heard Rios ask other employees those questions.

I also credit the uncontradicted testimony of Del Cid that Angelo Realí, through Rios, asked him if he signed a card for Local 813. I further credit the uncontradicted testimony of the employees concerning Rios’ questioning. Neither Angelo Realí nor Rios testified. The employees testified in a consistent manner concerning Rios’ pattern of interrogation and inquiries, in which he sought to learn the identity of the person who called Local 813, and who had signed cards. The fact that he was quoted as saying that the Realís wanted to learn this information supports a finding that Angelo Realí individually participated in the interrogation of Del Cid.

In addition, the fact that they later decided to admit that they had signed cards for Local 813 because they no longer wanted to maintain their denials that they signed cards, lends support to a finding that they were asked these questions.

I find that the questioning of the employees by Rios and Angelo Realí reasonably tended to restrain, coerce, or interfere with their rights to engage in union activities. *Rossmore House*, 269 NLRB 1176 (1964). No reason for the questioning was given to the employees, and no assurances against reprisals was made. The responses to the questions, either denials or no response, supports a finding that, from the employees’ perspective, the questioning was coercive.

The Creation of the Impression of Surveillance

I also credit the testimony of Del Cid and Perez that Rios told them that he knew who had signed cards for Local 813. However, I do not find, as alleged in the complaint, that this constitutes the creation of the impression of surveillance of the employees’ union activities.

In order to find such a violation, I would have to find that the employees “would reasonably assume from the statement in question that their union activities have been placed under surveillance.” *United Charter Service*, 306 NLRB 150 (1992).

The signing of the cards took place off the company premises. The location was specifically changed from a restaurant to a park so that Respondent would not observe their activity. The comment is also at odds with the statements made immediately thereafter. Thus, it must have been obvious to the employees that Respondent could not know who signed cards if Supervisor Rios immediately asked the employees whether they signed such cards. Their continued denials of having signed the cards lends support to a finding that they could not reasonably have believed that Respondent knew who had signed.

In addition, no information was given to the employees as to who, specifically, had signed cards for Local 813. I will accordingly recommend that this allegation be dismissed. *LRM Packaging*, 308 NLRB 829, 832 (1992).

The Meetings with Employees

The complaint also alleges that Angelo Realí threatened Norman Ortega with discharge for criticizing Local 445 at a meeting at Respondent’s premises. I credit the testimony of Joel Chinchilla and Ortiz that Ortega excoriated Griffin and Local 445 at the meeting. I further credit Ortiz’ quote of Angelo Realí that Ortega could lose his job for criticizing Local 445. That constitutes an unlawful threat of discharge for failing to support favored Local 445. *Colonie Hill Ltd.*, 212 NLRB 747, 752 (1974), in which an employee was discharged because he was a “troublesome threat to [a favored union’s] continued representation of” the employees.

⁷ Realí conceded that Respondent distributes turkeys at Thanksgiving.

⁸ The complaint originally stated that Paul Realí was the driver.

The complaint alleges that on about July 20, Angelo Reali, offered money to employees to induce their abandonment of support for Local 813. This apparently refers to the meeting at which Griffin told the men that Local 445 would provide health benefits, and Carrillo mentioned that he did not know of that Union's existence when he was sick and needed help. Angelo thereupon remarked that Carrillo could have asked him (Angelo) for the money for a doctor's visit. I cannot find that that statement violated the Act. It had no reference to Local 813, was not an inducement to employees to abandon that union, and was simply an innocuous remark that if Local 445 was not available to assist, Respondent would have helped the employee financially. There was evidence that Respondent did help its employees through loans. Such loans have not been alleged as unfair labor practices. Accordingly, I find no violation in Angelo Reali's statement.

There was some confusion among the General Counsel's witnesses concerning who was present at the meetings they attended with Respondent's officials. Regarding the meeting initiated by the men, Local 813 Agent Jackson testified that Paul and Peter Reali were present. However, Joel Chinchilla and Pineda testified that only Michael Reali was present.

Regarding the content of the meeting, I find that the version offered by Jackson and Chinchilla, and part of the version of Pineda is what actually occurred. According to that version, the sole purpose of the meeting was to tell Respondent's officials that the men were interested in Local 813 and not Local 445, and they did so at that meeting.

Pineda's version of the meeting with Michael Reali was consistent with the meeting which was conducted later, at Respondent's direction. I credit the testimony of employees Joel Chinchilla and Hugo Carrillo that at that meeting, Michael Reali asked them why they signed cards for Local 813, and told them that they would have to show proof that they were in the United States legally. I also credit the testimony of Del Cid, who also testified that Michael Reali told them if they "paid attention" to Local 813, they would have problems, and would be asked for their green [immigration] cards. Del Cid also stated that Reali said that Local 813 was "bad." I further credit Ortiz' testimony that Michael Reali told the men that he would close the shop if they continue, apparently with their union activities, and that he also asked to see their green cards the following day.

Employees Joel Chinchilla, Hugo Carrillo, Del Cid, Ortiz, and Perez testified similarly about that meeting. I credit the employees' testimony essentially because their versions were essentially similar, and mutually consistent. While it is true that only Ortiz mentioned that Reali threatened to close the shop, that does not mean that he did not make that statement. They heard and remembered different parts of the same conversation.

The employees testified similarly that Reali told the workers that they are a family, reminding them that he did favors for them, such as lending them money, and giving them Thanksgiving turkeys, and urged them to think with their "hearts and minds" about what they were doing.

Their testimony is supported by the fact that Michael Reali conceded that he held one meeting with employees, at which he told them that he always treated them as family members, and urged them to think with their minds and hearts concerning their activities, and they would make the right decision.

In this respect, I reject Reali's testimony that the meeting was related solely to his concern that employees were not being productive. That may have been true, and he attributed their

lack of productivity to their preoccupation with Local 813, but nevertheless used the opportunity to unlawfully interrogate and threaten them concerning their union activities.

I accordingly find that at this meeting Michael Reali interrogated employees by asking them why they signed cards for Local 813, and threatened to close the shop if they selected Local 813.

I further find that Respondent unlawfully threatened to demand to see their immigration papers. Although employers have a right to see such documentation, this request was made in a threatening manner in the context of a meeting at which Respondent sought to unlawfully coerce them into not supporting Local 813, the union of their choice. Reali specifically told them that if they paid attention to Local 813, he would ask for their papers.

The Attempt to Run Down an Agent of Local 813

The complaint alleges that Respondent attempted to run down Local 813 Agent Jackson. As set forth above, Jackson stated that a Jeep nearly hit him as he stood in front of Respondent's facility.

I cannot find a violation based on the evidence received. Jackson testified that he saw the Jeep parked in front of the office. Assuming that this establishes a connection between the Jeep and Respondent, which itself is highly speculative since no specific identification of the Jeep, through license plates or other description was made, and Jackson testified that employees park their cars in the same area, nevertheless no definite link between Respondent and the driver has been proven.

No identification of the driver was made. It should be noted that the complaint originally stated that Paul Reali was the driver, but the complaint was amended during Jackson's testimony to state that a member of the Reali family, first name unknown, committed the violation. While it is true that Jackson stated that he believed that the driver was one of the Reali "boys" who he saw regularly at the office, he conceded having no business with him.

The names of the owners and officers of Respondent, Angelo, Michael, Peter, and Paul Reali, were set forth in the complaint, and their relationship to Respondent was admitted. Jackson named none of those persons as the driver.

Assuming I find that a relative of Respondent's owner committed the violation, I would also have to find that that person acted as an agent of Respondent.

Family relationship is one of the facts to be considered in determining apparent authority and, when viewed in the context of other factors, may be sufficient for a finding of agency based on apparent authority. However, it would be an error to hold that nonemployee relatives of an agent are per se agents of an employer. [*Laborers Local 270*, 285 NLRB 1026, 1028 (1987).]

There is no evidence that this individual acted in any respect in behalf of Respondent. Jackson testified that he has seen him many times in Respondent's dispatcher's office, located at Royal, but notwithstanding that Local 813 has a collective-bargaining relationship with Royal, Jackson has conducted no business with this man.

There is no evidence that this unnamed person had actual authority to act for Respondent. Nor is there any evidence that Respondent held him out to the employees or to the public as one of Respondent's representatives. The only possible argument that the General Counsel could make is that, this individ-

ual was continuing Respondent's policy of keeping Jackson away from its property. As set forth above, Jackson testified that whenever he walked on the street in front of Respondent's property, one of Respondent's owners closely followed him, and told him to get off its property.

However, one cannot assume from Respondent's direction of Jackson to get off its property that the driver of the Jeep was thereby authorized to hit him with his car.

Based on the lack of identification of the driver and the vehicle, the absence of any showing of agency on the part of the driver, and the fact that other witnesses to the incident, the contractor and the employees, were not called to testify, I find that no violation of the Act has been established.

The Alleged Assistance to Local 445

The complaint alleges, and the answer admits, that from mid-July until October 30, 1992, Respondent granted Local 445 unrestricted access to its facility and employees for the purpose of campaigning and discussing issues related to the October 30 election, while during such period denied access to agents of Local 813.⁹

Such denial of access to a campaigning union has been found to be in violation of Section 8(a)(2) of the Act, and I so find. *Ella Industries*, 295 NLRB 976, 979 (1989); *Castaways Management*, 285 NLRB 954, 970 (1987).

c. The alleged packing of the unit

The complaint alleges that on various dates in August, September, and October, Respondent hired about 15 employees to artificially increase and pack the size of the voting unit for the purpose of influencing the results of the election, in an effort to assure that a majority of employees did not vote for Local 813 in the election.

Respondent denies the allegation, and asserts that the employees were properly hired due to business considerations.

The petition was filed by Local 813 on July 15. Thereafter, a Stipulated Election Agreement was executed by all parties and approved by the Regional Director on October 9. The Agreement provided that those eligible to vote included employees who were employed during the payroll period ending October 7. The election was conducted on October 30.

Respondent's payroll records reveal the following:

On July 15, the date the petition was filed, and which was also the date the payroll period ended, Respondent employed 19 unit employees.¹⁰ The unit status of three other employees is in question. Thus, there was testimony that Antonio Costa was a supervisor. David Baksh and David Gustman are pickers, but are salaried, unlike the other unit employees who are hourly paid.

Week Ending Date ¹²	Number of Hourly Employees	Hours worked by Hourly Employees	Avg. Hours per hourly Employee	Employees ¹¹ Working Less than 32 hours per week
9/19/91	17	675-205 ¹³	40/12	0
10/16	16	639/78	40/5	0
11/13	15	600/133	40/9	0
12/11	14	551/107	39/8	1
2/12/92	15	600/134	40/9	0
3/11	17	653/137	38/8	2 ¹⁴
5/15	18	658/136	37/8	1
5/13	21	733/119	35/6	1
6/10	22	820/164	37/7	3
7/1	20	713/98	36/5	3
7/8	19	764/14	40/.7	1
7/15	19	751/103	40/5	0
7/22	19	774/77	41/4	1
7/29	19	605/26	32/1	8
8/5	10	398/36	40/4	0
8/12	12	400/52	33/4	0
8/19	13	480/64	37/5	2
8/26	13	506/39	39/3	0
9/2	16	609/59	38/4	1
9/9	24	763/58	32/2	8 ¹⁵
9/16	27	780/31	29/1	12 ¹⁶
9/23	28	867/96	31/3	8
9/30	28	885/50	32/2	10
10/14	27	850/42	32/2	11
10/21	27	878/51	33/2	10
10/28	29	918/20	32/.7	12
11/4	29	945/28	33/1	10
11/11	29	971/75	34/3	9

Michael Realí testified that Respondent's busy season is the summer, from June through October or November, when most construction takes place. During those months, contractors utilize containers to dump construction debris, which is deposited at Regal's facility.

Realí explained that during the busy period in 1992, Respondent had more business than in the comparable period in 1991, because the price for dumping raw garbage to its customers dropped from an average of \$71 per ton in 1991 to about \$57 per ton in 1992. Accordingly, Respondent had to remain open longer hours due to the greater demand, in order to make the same amount of money it did in 1991. Employee Pineda testified that in late July 1992 the amount of work at Respondent's facility increased, but that there was about the same amount of work in the summer of 1992 as there was in prior years. Pineda further stated that in past years, Respondent did not hire additional employees for the busy, summer season.

⁹ Respondent's answer did not respond to those allegations of the complaint, and they accordingly were deemed to be admitted to be true. Sec. 102.20 of the Board's Rules and Regulations.

¹⁰ They are Abdool, Awan, Calderon, H. Carrillo, L. Carrillo, M. Carrillo, Helbert Chinchilla, Joel Mancilla Chinchilla, Del Cid, Garcia, M. Lima, Moran, Nunez, Ortega, Ortiz, Perez, Pineda, Veluppil, and Woolard. I have not included Balkissoon, Brown, Kawala, Mahadeo, Minas, Munoz, Carlos Sanchez, or Cesar Sanchez because, although they are listed on the payroll, they worked no hours in that or succeeding weeks.

¹¹ Employees Baksh and Gustman have not been included in this analysis. There is some dispute about their status. Although they were identified as pickers, they were salaried employees until September 16, 1992, when they became hourly workers.

¹² These payroll records are all the records received in evidence.

¹³ The two numbers represent regular hours/overtime hours. The total hours have been rounded off to the nearest hour.

¹⁴ Five employees worked 32 hours.

¹⁵ Six of the eight were hired that week.

¹⁶ Two of the twelve were hired that week.

Most of the new employees hired were employed as pickers. Reali stated that the picker selects items from the garbage which can be recycled, and places them in separate containers. The pickers also sweep and clean the area, and surrounding streets, plant trees, paint the facility, run errands for the mechanics, act as welder's assistants, and operate the scale.

Local 813 Agent Jackson testified that beginning in early August, he stood outside the facility and counted the employees daily. He conceded that he could not see the rear loading dock, but could see virtually all the employees. He counted from 14 to 18 each day, including many he had not seen before that time, and there were times that employees were present one day but absent the next. He observed them performing picking jobs, but in August and September, he saw other employees just sweeping. He stated that regular pickers had swept in the past, but those he observed sweeping did no picking. Jackson conceded, however, that after watching them sweep for 1 hour, he did not know what other jobs they performed.

Pineda testified that the new pickers swept the street. He stated that prior to their hire, no one was ever assigned to sweeping, and no one swept outside the facility before these new hires. Pineda conceded, however, that in 1991, pickers swept the facility when a garbage truck picks up garbage, and when a truck is loaded. He further stated that these new pickers swept the office, the inside shop, the diesel-fill area, and the yard, street, and sidewalk.

Pineda testified that the new sweepers began work as he left work at 1 p.m. Employee Del Cid stated that he saw pickers who began work before the regular 6 a.m. start for the regular employees. Del Cid also testified that he and other pickers washed trucks among their other duties. Employee Hugo Carrillo stated that pickers paint containers, but swept only the area where they worked. Employee Joel Chinchilla also painted containers. Chinchilla also stated that from November 1991 through late July 1992, he saw pickers sweeping every day, when the trucks were loaded. Employee Ortiz stated that he observed pickers who began work before 6 a.m., and those who began work after 2 p.m. He further stated that he has seen pickers wash trucks, paint containers, and sweep the building he works in.

Employees who testified for General Counsel testified that they knew some of the challenged voters, but did not know or remember others. Pineda testified that in the week before the election about 18 pickers were employed, but following the election only about 5 employees were working, including 1 machine operator and 4 pickers. Nevertheless, Respondent's payroll records show substantial numbers of employees on the payroll following the election.

Analysis

The Board has held that an employer's hire of a substantial number of employees in order to "pack the unit" and dilute the union's strength in a Board-conducted election violates the Act. *Einhorn Enterprises*, 279 NLRB 576, 596 (1986). The question, which frequently turns upon circumstantial evidence, is why were the disputed individuals added. *Golden Fan Inn*, 281 NLRB 226, 228, 229 (1986).

Here, 20 employees were challenged by Local 813: Hasan Abdool, David Baksh, Roy Dortch, Richard Ferraro, Julio Flores, Jose Gomez, David Gustman, Carlos Hernandez, Alex Martinez, Damon Mason, Derrick Mason, Alejandro Montalvo, Roberto Montalvo, Dimas Nunez, Roberto Peraza, Jose Pina, Ahmed Sagheer, Nelson Toledo, Jose Toribio, and Giro Valen-

tin. All were identified by Michael Reali as being unit employees, mostly pickers. All except Abdool, Baksh, and Gustman were hired from August 14 to September 10, 1992.¹⁷

An analysis of the above payroll records demonstrates a change in Respondent's employment practices. We are concerned with Respondent's employment history during August and September 1992 through the election on October 30.

In a comparable period in 1991, Respondent employed 17 and 16 employees, respectively, on September 19 and October 16, 1991. Significantly, they were all full-timers working 40 hours per week, and worked a total of 880 and 717 hours, respectively, with substantial overtime in both weeks.

In contrast, from September 9 through the pay period ending November 4, 1992, Respondent employed a steadily increasing number of employees, from 24 to 29, who worked an average of about 32 hours per week, proportionately less overtime, and during which, from 8 to 12 employees worked less than 32 hours per week.

Thus, in 1991, Respondent employed fewer employees, all of whom worked full time, with greater overtime. In 1992, its complement consisted of 12 more employees, who individually worked fewer hours and less overtime. Thus, in 1992, Respondent employed more employees, many of whom were part-timers, who worked fewer hours.

Respondent explains this change in practice by asserting that it was required to stay open later due to a greater demand for its services, and therefore had to employ more employees to work longer hours. According to Reali, the demand for its services occurred in its busy season in 1992, which began in June.

However, the hires of these additional employees did not begin until mid-August, with the vast majority being hired in early September. From June through August 26, 1992, Respondent employed about 10 fewer employees than it employed beginning on September 9, 1992. Accordingly, if in fact Respondent had a need for more employees during the busy season in 1992, it would have begun hiring them in June. However, the number of its employees remained steady, from 19 to 22 in that period, and would have remained at that level had the 7 employees not been discharged in late July. Instead, the new employees were hired later, in mid-August and September, well into the busy season, which runs only to October or November. I find that the additional hires were clearly made in order to influence the outcome of the election.

In addition, there was evidence that a substantial number of the pickers were performing more sweeping work than had been done in the past.

In this regard, it is noted that had Respondent needed the services of so many workers in June, July, or even August, it would not have chosen late July to review the immigration documentation of its employees, and discharge seven of them in late July. This further adds support to my finding that Respondent would not have discharged the seven in the absence of their union activities, to be discussed *infra*.

Under these circumstances, I cannot view Respondent's "sudden, substantial, unprecedented, and unsatisfactorily explained augmentation" of its employee force, in any light other than an attempt to dissipate Local 813's strength, and to thwart the efforts of that union's supporters to secure representation by that union in the October 30 election. *Suburban Ford*, 248

¹⁷ Abdool and Baksh were hired before the petition was filed.

NLRB 364, 368 (1980); *Trend Construction Corp.*, 263 NLRB 295, 300 (1982).

Specifically, I find that all those employees set forth above, who were challenged, with the exception of Abdool, Baksh, and Gustman, were hired for the purpose of influencing the election in violation of Section 8(a)(1) of the Act.

As to Abdool, Baksh, and Gustman, I find that they were not hired in order to pack the unit or to influence the election. Baksh and Gustman were regular employees of Respondent in 1991. Gustman was hired in February 1992, before Local 813 began to organize the employees. Their status will be further discussed in the representation case section of this decision.

2. The alleged discrimination

a. Alleged actions against Hugo Carrillo

The complaint alleges that in late July 1992, Angelo Realí physically assaulted employee Hugo Carrillo, and imposed more arduous and less desirable conditions of employment on him.

Carrillo is a picker whose job is to pick the recyclable materials from other garbage, and sort those items by type of matter. He testified that some time after he told Supervisor Rios that he signed a card for Local 813, Angelo Realí called him into the office and complained that he mistakenly threw recyclable aluminum into the area for iron and garbage, and not into the aluminum container. Angelo yelled at him, insulted him, called him stupid, and made comments about his mother. Carrillo conceded that he put the aluminum in the wrong container.

Angelo's brother, Paul, was present during this tirade and interceded, telling Angelo not to insult him. Paul escorted Carrillo out of the office. Later, Carrillo was told by Peter Realí to eat lunch alone, and not to go downstairs, where he usually eats with his coworkers.

Carrillo, who denied that he had been touched by Angelo during this incident, stated that this was the first time he had been criticized for not sorting the aluminum properly. Carrillo also denied that he was given harder or less desirable work to do in July 1992.

Analysis and Discussion

The evidence failed to establish a violation concerning Carrillo. There was no evidence that Angelo Realí physically assaulted Carrillo, as alleged in the complaint. Carrillo signed a card for Local 813 on July 13. At some unknown time thereafter, Carrillo was yelled at, insulted and called stupid by Angelo Realí after he admittedly threw aluminum into the wrong container. Carrillo denied being touched by Realí.

The complaint also alleged that Respondent imposed more arduous and less desirable conditions of employment on him. Carrillo denied that he was given harder or less desirable work to do that day. The only evidence which goes to this allegation is that Paul told him not to eat lunch with his fellow employees that day. That does not constitute the imposition of harder or less desirable work.

First, I cannot find that the General Counsel has established a prima facie showing that Carrillo's union activities was a motivating factor in Respondent's decision to ask him to eat alone. Carrillo admittedly told Rios that he signed a card for Local 813, and was subject to unlawful interrogation by him. During the criticism, no mention was made of Local 813, or the fact that he signed a card for it. I do not believe that the General

Counsel has established a prima facie case of discrimination against Carrillo for his union activities.

Assuming that a prima facie case has been made, I find that Respondent has met its burden of demonstrating that it would have taken such action even in the absence of his union activities. *Wright Line*, 251 NLRB 1083 (1980). Thus, although Carrillo testified that he was never yelled at before, there was no evidence that he engaged in any conduct which warranted criticism before. Respondent's conduct in criticizing him for putting aluminum in the wrong container was not unjustified. The harsh criticism levied by Angelo Realí was immediately softened by Paul's advice to Angelo not to insult Carrillo.

I accordingly find that no violation has been established in Respondent's treatment of Carrillo, as alleged in the complaint.

b. The mass discharge

The complaint alleges that on July 28 Respondent unlawfully discharged Maynor Lima Bobadillo, Hugo Carrillo, Mario Carrillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez because of their activities in behalf of Local 813.

Respondent denies that it acted in violation of the Act. Its defense is that it laid off the employees until such time as they could produce proper immigration documentation permitting them to lawfully work in the United States.

The Employees' Testimony

Hugo Carrillo became employed for Respondent in 1991. He testified that in July 1992, each employee was asked to come to the office. Present were Michael and Paul Realí, and Rios, who translated. Michael asked him to produce a green card. Carrillo did not have one. Michael said that he was discharged, but that he could return to work when he had a work permit.

Carrillo testified that that was the first time he was asked to produce a green card. However, he also testified that he did not recall whether, when he began work, he was asked by management to produce documentation establishing his lawful ability to work in the United States.

Carrillo, as well as the six other employees set forth above, received the following letter, dated July 28, at their individual meetings held on that day:

In the large amount of time that we have extended to you we are regretful that you have not produced the proper proof of residence that is required by the federal government which makes you eligible to work in the United States of America. Since you have failed to submit the documents we have no choice but to ask you to hold off from your employment until such time that the documents are brought into the office.

Thereafter, Carrillo contacted Local 445 Agent Griffin, who referred him to an attorney who is working on obtaining a work permit. Carrillo showed some paper to Respondent, and in November 1992, Carrillo was permitted to return to work.

Joel Chinchilla began work at Regal on November 29, 1991. He testified that on his hire, he was asked by Angelo for identification. Chinchilla showed him a green card, which Angelo made a copy of. He was not asked to complete an immigration form.

At his meeting in late July, Chinchilla was asked for his green card by the Realís. He refused, saying that they were not the immigration authorities. He told them that they had made a copy of the green card upon his hire, but they said that they did not have it. He was given the above letter, and told that if he did not have proper papers he could not return to work. He then

left the shop and did not return. Chinchilla admitted that the green card he initially showed Reali was a forgery, which probably accounts for his refusal to again display it.

Thereafter, Respondent contacted Chinchilla and asked if he wanted to return to work. Chinchilla refused because he did not yet have the proper immigration papers. Chinchilla testified that he has not applied for legal status.

Julio Del Cid began work on November 28, 1990. Upon his hire he completed a tax form, but not an immigration form. He was not asked to produce papers which showed that he was a lawful resident of the United States.

On July 28, his last day of work, Del Cid was shown the above letter and was asked if he had his papers. He said that he did not, and was told that he could return to work when he had a document from the Immigration Service. Del Cid stated that prior to July 1992, no one spoke to him regarding having the proper documentation in order to work. Del Cid testified that he never obtained the proper papers to work legally in the United States.

Mario Ortiz began work in November 1991, at which time he was asked for documentation, and showed Angelo a work permit. Angelo made a copy of the permit, and said it was fine, and that he could work. He did not complete an immigration form at that time.

In July, Michael Reali asked to see his work permit. Ortiz presented it, and was told by Reali that it was expired. Reali then showed him the above letter, and told him that when he renewed his employment permit he could return to work. He then left. Three days later, he produced a document which stated that he was awaiting the renewal of his permit. At that time, Michael Reali asked him if he saw or contacted any Local 813 agent, or signed any document. Ortiz replied that he had not.

Ortiz produced a letter, 2-1/2 months later, which Michael Reali said was not valid. He was asked to produce an employment authorization. Thereafter, he returned with valid documentation, and returned to work in November 1992.

Nery Perez began work for Respondent in November 1991. He did not fill out an immigration form when he was hired, and no one asked whether he was lawfully able to work in the United States. However, he did produce a marriage certificate which showed that he was married to a United States citizen. He testified that he was first asked for immigration papers about 1 week before his discharge. At that time, Michael Reali asked if he had a green card. He replied that he did not have one. That was the first time he was asked to produce a green card.

Thereafter, Michael Reali told him that he had until July 27 to produce the papers. On July 28, Michael Reali asked for his papers. He said that he did not have them, and was given the above letter. Perez testified that he has done nothing to obtain proper authorization to work in the United States.

Edgar Pineda began work for Respondent in April 1988. He testified that in July 1992, Rios told each of the workers that Michael Reali wanted to see their papers, such as green cards or work permits. Pineda went to the office and showed Michael his papers. Michael said that they were in order and he could continue to work.

Pineda stated that he was never asked for his papers before that time.

Thus, the following employees were discharged on July 28, allegedly for failing to produce proper immigration documents:

Hugo Carrillo, Mario Carrillo, Joel Chinchilla, Julio Del Cid, Maynor Lima Bobadillo, Mario Ortiz, and Nery Perez.

Respondent's Evidence

Michael Reali testified that in the past, upon an employee's hire, Respondent's officials asked him for his "papers," including Social Security identification, and other documentation. If they said that they had no documentation, they were not permitted to work. If they said that they had proper papers, they were permitted to work.

Respondent experiences a large turnover of employees, and in the past 2 years, nearly 90 employees have worked for it. Reali stated that Respondent always asks for documentation, but sometimes it was not forthcoming. Occasionally when employees were asked for proof that they were lawfully in the United States, they would leave Respondent's employ.

Reali testified that he asked the seven employees during their employment to produce proof of lawful ability to work. They agreed to, but never produced it, but were nevertheless permitted to remain at work.

Reali testified that in May 1992, he consulted with a law firm, and thereafter began to document Respondent's request for proof of lawful residence. Prior to that time, all requests of employees had been verbal. According to Reali, in late June 1992, he distributed the following undated letter to all employees. This was the first time that he made such a request in writing:

In order to update our employee files we must request that you submit all documents to show proof of residence in the United States of America. Please submit this information to the office to make copies no later than July 27, 1992. Thank you for your cooperation.

Reali testified that most employees complied with that letter, by producing proper documentation, and they were permitted to work, but the seven did not have such proof. Accordingly, he laid them off, on July 28, in order to comply with the law which prohibits employment of workers who do not have proof of lawful residence in the United States. He told them that they could return to work when they received proper documentation.

Although Respondent does not keep individual personnel files for each employee, certain documents were produced pursuant to subpoena. The following documents were produced for the following employees who were employed during the payroll period ending July 15, 1992: Shoaib Moham Awan: W-4 IRS payroll deduction form; David Baksh: I-9 Immigration form, but with no boxes checked which would show that specific items of proof of residence were submitted and examined, W-4, copy of driver's license; David Gustman: W-4; Dagoberto Moran: W-4, and a social security card, both of which say Dagoberto Vasquez, and an employment identification card.

It should be noted that Awon, Baksh, Gustman, and Moran were not discharged, but continued in Respondent's employ after July 28.

The following documents were produced for employees who were hired after the July 28 mass terminations: Robert Monk: W-4; Richard Ferraro: W-4; New York State driver's license; Julio Flores: I-9 resident alien card, W-4, social security card, and employment application; and, Roberto Montalvo: I-9, W-4, employment application.

Michael Reali testified that following July 28, no one was discharged for not having the proper immigration documentation.

Certain employees disputed Realí's testimony that they received the undated letter which allegedly was given to all employees in June. Thus, Del Cid testified that he never saw the letter.¹⁸ Joel Chinchilla testified that he could not recall when he saw the letter, but he perhaps received it the day he was discharged. Hugo Carrillo did not remember if he saw the letter. Mario Ortiz stated that he saw the letter, but does not remember when, adding that he saw it about 3 weeks before his layoff. Nery Perez testified that he saw the letter, but did not testify as to when he saw it.

It should be noted that employees Calderon, Hugo Carrillo, Maynor Lima Bobadillo, and Ortiz returned to work upon presentation of immigration documents satisfactory to Respondent. They had signed cards for Local 813.

Analysis and Discussion

The complaint alleges that on July 28, Respondent unlawfully discharged Maynor Lima Bobadillo, Hugo Carrillo, Mario Carrillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez because of their activities on behalf of Local 813.

All those employees signed cards for Local 813 on July 13. On July 17, Respondent was told by Local 813 agents that a majority of its employees had signed cards for that union. One employee, Hugo Carrillo, told Supervisor Rios on about July 21 that he signed a card for that union. All of the seven employees were present, when on about July 21, they went to Respondent's office with Local 813 agent Jackson, at which time Michael Realí was informed that they wanted Local 813 and not Local 445.

I accordingly find that Respondent possessed knowledge that all seven employees sought representation by Local 813.

Shortly after Respondent learned that its employees wanted to be represented by Local 813, Respondent requested immigration papers from all its employees. Perez testified that he was asked for such papers about 1 week before his discharge, and was given until July 27 to produce them. The other six employees all testified that they received the July 28 letter on that date, which notified them that they had not produced proper proof of residence, and were discharged that day.

Based on the close timing between the employees' interest in Local 813 and Respondent's knowledge thereof, the findings of animus I have made above, including the findings of coercive interrogation, threat of plant closure, threat of discharge to employee Ortega because he criticized Local 445, and significantly, the threat that immigration documents would be required if they continued to support Local 813, I find that the General Counsel has made a prima facie showing that the union activity of the seven employees named above was a motivating factor in Respondents' decision to discharge them. Wright Line, supra.

Respondent first argues that the employees were not discharged, but rather were laid off until such time that they were able to produce proper eligibility to work in the United States. Its June 28 letter stated, in part, that "since you have failed to submit the documents we have no choice but to ask you to hold off from your employment until such time that the documents are brought into the office."

The test for determining whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had

been discharged and the fact of discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure has been terminated. *Ridge-way Trucking Co.*, 243 NLRB 1048 (1979).

By asking its employees to "hold off from their employment" Respondent in effect told them that they no longer worked for it. The fact that they could return to work at some later time does not change the fact of their discharge upon receipt of the letter. *Future Ambulette*, 293 NLRB 884, 893 (1989), where a discharge was found when an employee was terminated due to an injury but told that he could reapply when he was able to work; *Midwestern Mining*, 277 NLRB 221, 228, 244 (1985), where discharges were found where the employees were told that they might be rehired if additional equipment was obtained.

When given the letter on July 28, the only conclusion the employees could have reached was that they were discharged. A possibility of reinstatement was given them in the letter. The letter did not guarantee reinstatement upon their production of the documents. It only asked them to stop work until the documents were brought to the office. It is true that those employees who did obtain proper documentation were employed immediately. Nevertheless, looking at the situation on July 28, the employee would conclude that he had been discharged until he presented satisfactory documentation of proper proof of residence. I accordingly find that the seven employees were discharged on July 28.

Respondent argues that the workers were properly terminated because they were undocumented aliens prohibited from being employed by the Immigration Reform and Control Act of 1986 (IRCA).

It first argues that it had no anti union animus in discharging the employees because it had asked them, in its undated letter allegedly given them in June, to provide documents showing proof of residence by July 27. If this letter was given to employees, it would provide some proof that their discharge was not motivated by union considerations since the letter was allegedly distributed before the union campaign began.

However, the evidence does not support a finding that the June letter was distributed to employees. Michael Realí testified that following the distribution of that letter, most employees produced such documentation and were permitted to work.

I credit the testimony of employees Del Cid and Joel Chinchilla that they either did not see the undated June letter or saw it for the first time on the day they were discharged, July 28. Ortiz' testimony that he saw the letter about 3 weeks before his discharge lacks certainty, in view of his earlier testimony that he did not recall when he saw the letter. In addition, in contrast to other letters sent by Respondent, this letter was undated.

I accordingly find that the undated June letter was not distributed to employees.

The documents sought were apparently those required in the I-9 INS Form, which include a U.S. passport; certificate of U.S. citizenship; certificate of naturalization; unexpired foreign passport; alien registration card; or driver's license, U.S. military card, and social security card, birth certificate, and unexpired INS employment authorization. According to the I-9 form, those documents are to be examined by the employer, and the appropriate boxes checked indicating that this has been done.

¹⁸ Del Cid first testified that he saw the letter on the day he was fired.

At the hearing, Respondent produced certain documents in its possession, set forth above, for various employees who were employed at the time of the seven discharges, but who continued to work after the July 28 discharges. Those employees must have been among those who, according to Michael Reali, showed proper documentation and were permitted to work. However, none of the documents produced for employees Awan, Baksh, Gustman, and Moran satisfied the I-9 requirements. The completed I-9 form for Awan and Gustman, at least, were required to be retained by Respondent at the time of the hearing.¹⁹ Accordingly, Respondent did not enforce equally its policy of terminating employees who did not produce the required documents. Those employees were not among the employees who signed cards for Local 813.

In addition, even after the July 28 terminations, Respondent did not adhere to its strict policy of employing only those with proper documentation. Thus the documents, set forth above, produced at hearing for Monk and Ferraro, hired on August 14 and September 7, respectively, do not satisfy the I-9 requirements.

Respondent argues that documentation was required of the employees upon their hire, and that the seven employees were asked for documentation, but never produced it. However, the evidence does not substantiate this. Hugo Carrillo was not asked for a green card until the date of his discharge. Significantly, he was permitted to return to work upon the presentation of some "paper," while he was in the process of obtaining a work permit. Joel Chinchilla was only asked for identification upon his hire, not proof of residence, and he produced a green card. Del Cid was not asked for proof of residence upon his hire. Perez produced a marriage certificate upon his hire. Pineda was not asked for documentation until July. Only Ortiz testified that upon his hire he was asked for documentation, and he showed Angelo Reali a work permit. Indeed, the fact that Respondent has not retained copies of the I-9 forms for certain employees, or copies of the documents allegedly submitted, supports an inference that such documents were not requested.

Thus, based on my findings that (a) the June letter was not distributed to employees, (b) disparate treatment was accorded the card signers who were discharged while the noncard signers were permitted to work although they too did not have proper documentation to work, (c) employees who did not have proper documentation were hired shortly after the discharges, and (d) these discharges occurred during Respondent's admittedly busy season, I conclude that Respondent has not demonstrated that it would have discharged the seven employees in the absence of their union activities. *Wright Line*, supra.

I accordingly find and conclude that Respondent's discharge of Maynor Lima Bobadillo, Hugo Carrillo, Mario Carrillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez violated Section 8(a)(3) and (1) of the Act.

¹⁹ The completed I-9 form was required to be retained for 3 years after the date of hire or 1 year after termination, whichever is later. Awan was hired on April 23, 1992, and last appears on the August 26, 1992 payroll. Gustman was hired on February 17, 1992, and appears on the last payroll submitted, December 30, 1992. The dates of hire of Baksh and Moran are not known.

c. The warning to and discharge of Pineda

Pineda's Testimony

The complaint alleges that on November 19 Respondent issued a written and verbal warning to Edgar Pineda, and on December 10 discharged him because of his activities in behalf of Local 813.²⁰

Pineda became employed by Respondent in 1988. He was promoted from picker, to payload operator, and then bulldozer operator. As set forth above, he contacted Local 813, and arranged a meeting with its representatives and the employees. He also participated in the October 30 election as an observer for Local 813.

Pineda testified that he worked without incident until November 17, when, as he was operating the bulldozer, its right metal track became separated from the wheel, causing severe damage. Pineda stated that this occurred because the bolts holding the track to the wheel were subject to hard wear and broke. He told his manager, who called the mechanic. Pineda helped the mechanic fix the track, and Pineda was instructed to work on a different bulldozer.

On November 19, he was given a letter by Michael Reali which set forth as follows:

Please be advised that this is the second notice of negligent equipment abuse and will serve as the final warning before termination of your employment. On November 10, 1992 while operating the Caterpillar 963 bulldozer it ran out of fuel, causing extensive engine damage. On November 17, 1992 while operating the same bulldozer, the right track separated from the wheel causing severe damage. In the future, please be alert and operate the equipment with proper care, its [sic] part of your job. This type of negligent abuse and destruction of equipment will not be tolerated.

Pineda stated that prior to November 19 he was not informed that his bulldozer had run out of fuel on November 10. He stated that while he was operating it, it worked fine. The machine had run out of fuel before, in about September, and at that time Pineda told his manager, who told him to put more fuel in, pump the fuel through the engine, and continue working. These steps were taken, the bulldozer's engine started, and continued to run without incident. He was not warned for that incident.

On November 19 when he was given the above letter, Michael Reali blamed him for letting his machine run out of fuel. Pineda denied that it was his fault, saying that it was working well when he operated it, and suggested that it was the fault of the person who continued to work on the machine when Pineda left at 1 p.m.

Pineda testified that on December 7, as he was operating his machine, he noticed that water was leaking from its radiator. He stopped the machine and notified Manager Ronald who called the mechanic. The mechanic worked on the machine and informed Pineda that it was fixed, and that he could operate it. He was then instructed by Ronald to grind some wood. About 5 minutes later the machine stopped, and the engine began to smoke. The mechanic was called and instructed Pineda to move the machine to a different place. Pineda started the engine and moved the bulldozer. Shortly thereafter, Pineda went home at the end of his shift.

²⁰ See the charge in Case 29-CA-17056.

The following day, Pineda was given other work to do as the machine was still being repaired. At the end of the day, Angelo Realí told Pineda to take the following day, December 9, off, as the machine was still being fixed. When Pineda returned to work on December 10, Angelo Realí told him that there was no more work for him because the machines were being damaged too much. Pineda protested that that was not his fault because he told the mechanic many times that the machine was not working properly, but was told to continue working on it.

Pineda left Respondent's premises, and 1 hour later, he was given the following letter at his home by Michael Realí and Rios:

On December 7, 1992 while you were operating the Caterpillar bulldozer the engine seized causing extensive damage. This was caused by operating the bulldozer with improper oil and diesel. Since this is your third notice, you will be terminated immediately. In the future if there is any way that I can assist you please do not hesitate to call me.

Pineda protested to Michael Realí that the machine broke, and that he told the mechanic that the machine was no good. Michael insisted that the damage was his fault.

Pineda testified that it is the operator's job to put fuel in the tank and check and install oil in the engine each day, and that he performed these procedures. He recalled that on December 7 he checked the oil and fuel and found nothing amiss.

Respondent's Evidence

Michael Realí testified that on June 24 Pineda's bulldozer ran out of fuel while he was operating it. The repair logs indicated that the fuel lines were removed, and the system cleaned of residue from the fuel tank; air was pumped through the fuel lines, two fuel filters were replaced, the tank was filled, allowed to settle, and the fuel system was primed and pumped to remove air trapped in the fuel lines. Realí stated that on June 26 Pineda was given the following letter:

Please be aware that this is a notice of negligent abuse of equipment and will serve as your first warning. On June 24, 1992 while operating the Caterpillar bulldozer it ran out of fuel, causing severe engine damage. In the future, please be alert and operate the equipment with proper care, its [sic] part of your job.

Pineda denied that his bulldozer ran out of fuel that day, and did not recall receiving this letter.

Realí testified that the same repair work had to be performed on November 10 due to Pineda's machine running out of fuel, as set forth above. Pineda denied that his machine ran out of fuel while he was operating it that day.

Realí stated that the track separated because it fit loosely on its sprocket. Realí testified that the track should always be tight, and Pineda should have noticed that it was loose. Accordingly, Realí blamed the separation of the bulldozer track on Pineda in that he apparently failed to notice that it was loose. Realí stated that a track will not separate if it is attached in a taut manner on its sprocket. Realí stated that the repair job was \$12,000 to \$15,000, and the bulldozer was out of service for 5 or 6 days.

Regarding the December 7 incident, Realí testified that the bulldozer's engine had seized because of low oil pressure, no oil, and no water. He stated that the oil pressure and temperature gauges and a warning light were all operating at the time of the problem. A new engine was obtained at a cost of \$15,000 to \$18,000. He denied Pineda's testimony that he moved the bull-

dozer after experiencing a problem with it. Realí stated that it is the operator's responsibility to check the gauges to make certain that there are sufficient fluids in the engine.

Accordingly, Respondent's position is that it discharged Pineda on December 10, as set forth in the letter of discharge, because of the engine seizure, which constituted his third notice of misconduct.

Analysis and Discussion

Pineda was employed by Respondent for 4 years. He was promoted from picker to payload operator to bulldozer operator. Pineda was the prime mover in the organizational campaign of Local 813. He made the first contact with that union, arranged the meeting with Local 813's representatives, signed a card in behalf of the union, and spoke to his fellow employees in the shop about the union. He also acted as the election observer for Local 813.

I have found above that Respondent possessed animus toward Local 813 as demonstrated by its violations of Section 8(a)(1) of the Act, and by its discharge of the seven employees.

I accordingly find that the General Counsel has made a prima facie showing that the union activity of Pineda was a motivating factor in Respondent's issuance of the warning letter of November 19, and in its decision to discharge him. *Wright Line*, supra.

Respondent asserts that its discharge of Pineda was justified because of his negligence in the operation of the bulldozers. As set forth above, the alleged misconduct consists of the bulldozer running out of fuel twice, the separation of a track, and the seizure of an engine.

Pineda admits that his bulldozer ran out of fuel once. This may have occurred on June 26. The maintenance log for bulldozer 973 shows that it ran out of fuel on that date. Respondent attributes that incident to him. The log indicates that a routine procedure was utilized to get the machine running: the fuel lines were removed; residue from the fuel tank was cleaned; air was pumped through the lines; two fuel filters were replaced; the tank was filled; the fuel system was primed and pumped to remove air in the lines, and the machine was started.

Pineda did not recall receiving a warning letter due to that incident, which took place 3 weeks before Respondent was visited by Local 813 agents. Even if he did receive the June 26 letter allegedly given to him, that letter stated that "severe engine damage" resulted from this incident. However, the maintenance log does not indicate that any damage was caused.

The same incident occurred on November 10. Pineda denies that this was due to any fault of his. Even if it was, the same routine was used to get the machine running. The warning notice regarding this, given to Pineda on November 19, stated that "extensive engine damage" resulted. The maintenance log does not support that statement. The log only states that rust was in the fuel lines due to the lack of fuel, and that the rust was cleaned from the lines.

On November 17, the right track of bulldozer 963 separated from its wheel. The maintenance log states that the right side was jacked up, the old track was removed, and a new track and sprocket were installed.

Respondent claimed that Pineda should have been aware that the track was loose from the sprocket, and therefore held him responsible for the separation of the track, terming it "negligent abuse and destruction of equipment" in its November 19 warning letter. As set forth above, Pineda claimed that the bolts,

which are subject to hard wear, broke, causing the track to separate.

It must be recognized that these bulldozers perform very heavy work in moving and pulverizing demolition materials. As a result, they receive regular maintenance work according to the logs. They are checked and greased every 2 days, and receive full service every 6 weeks. The full service includes checking the machine and changing the oil and filters.

The maintenance logs establish the hard wear these machines experienced, and the fact that the tracks were subject to especially severe operating conditions.

Thus, Caterpillar 963, which experienced the track separation, had extensive work performed on the tracks prior to the November 17 incident. The machine was acquired by Respondent on March 15, 1989. On March 22, both tracks were tightened. On July 30, the track segments were tightened. On August 13, the tracks were tightened. On September 23 a broken track segment was replaced. On February 10, 1990, the tracks were tightened, as they were again on August 11. On February 13, 1991, both tracks, but especially the left side track was tightened. On March 19 the sprocket segments were replaced. On July 6 an 18-inch steel rod stuck in the left track was removed. On March 28, 1992, the tracks were tightened. On April 25 one track segment was replaced. On August 15 the tracks were tightened, as they were on September 29.

Then on November 17 the right track separated, which was blamed on Pineda. Following his discharge, on March 16, 1993, both tracks were adjusted, and broken bolts were replaced on the left track. On March 23 broken bolts from sprocket segments were replaced, and the tracks were adjusted. On April 1 the track bolts were replaced. On April 2 both tracks were removed, the machine removed from service, the left sprocket and final drive were disassembled, both sides of the sprocket segments were removed, the tilt cylinder bracket was welded, and the idler rollers were replaced. Then both tracks were assembled, and both track frames were welded. On April 28 the left track motor hydraulic line was replaced.

Caterpillar 973 experienced similar service maintenance and repair work. Thus, between July 1989, when the machine was purchased, to December 1992, the tracks were adjusted six times, the segment bolts were tightened twice, the tracks were tightened once, and track segments were replaced once.

Based on the above, I do not believe that Respondent has met its burden of proving that it would have issued a warning letter to Pineda in the absence of his union activities. *Wright Line*, supra. The tracks were subject to severe service conditions. They were adjusted and serviced constantly which is some indication of the hard wear they were subjected to. They experienced more problems after Pineda's discharge. Under these circumstances, it was improper for Respondent to attribute the track separation to Pineda.

Regarding the seizure of the engine on December 7 Pineda denied that it was his fault. He stopped the machine immediately upon noticing that the engine's radiator was leaking water. Michael Reali testified that the engine repair company stated that the seizure was due to low oil pressure, and no oil or water. Respondent claims that Pineda negligently failed to check the engine's fluids. The log states that a rebuilt engine had to be installed.

Michael Reali stated that he was told that the cause of the seizure was low oil pressure and no oil or water. He thus had a reasonable belief that Pineda had caused that severe damage

through his negligence in not checking the machine's oil and water. Pineda admitted that it was his responsibility to make those fluid checks on a daily basis. I do not credit him that he made them. In view of the damage to the engine, I credit Reali's testimony that the engine would not start. I do not credit Pineda's testimony that he moved the bulldozer after the problem arose. His pretrial affidavit did not mention that important fact. Respondent gave un rebutted testimony that the cause of the seizure and the very costly engine replacement was lack of oil and water in the engine. The General Counsel has not shown how such damage to the engine could have occurred in any other way.

Pineda admitted that it was his duty to ensure that the machine had sufficient oil and water. Respondent could thus properly believe that the engine's seizure was due to his negligent failure to ensure that it had proper amounts of such fluids.

The General Counsel argues that the logs produced at hearing are unreliable because they were not the original logs prepared at the time of the repair by the mechanic. Rather, because of the poor penmanship of the mechanic, the original logs were rewritten later. The General Counsel further questions the weight to be given Reali's testimony concerning the breakdown because neither the mechanic nor the supervisor who witnessed the incident testified. However, I believe that Reali's testimony properly established the nature of the damage to the engine. No objection was made to his hearsay testimony that he was told the reason for the seizure was no oil or water in the engine.

On the other hand, the logs also show that the engine of the other bulldozer, the Caterpillar 963, seized on January 4, 1993, only 1 month after Pineda's discharge. The same remedial action was taken—the engine was removed, rebuilt, and installed in the bulldozer. There was no testimony concerning this breakdown, but Michael Reali stated that since July 1992, no one other than Pineda has been disciplined for misusing equipment.

The question must therefore be asked why the operator of the 963 was not disciplined for that engine's seizure, and does the failure to so discipline him demonstrate disparate treatment toward Pineda. One possible explanation is that that engine's seizure was not caused by a lack of oil or water, and was therefore not caused through any fault of the operator. Since I cannot answer that question upon the state of this record, I cannot find that Pineda was treated in a disparate manner.

Despite my findings above that Respondent demonstrated strong union animus, it cannot be said that it took any specific action against Pineda upon learning that he was actively supporting Local 813. Specifically, when he appeared as that union's observer at the election on October 30, it did not discharge him 2 weeks later upon his alleged misconduct in the track separation incident.

Although I find that the warning letter of November 19 violated the Act, I cannot find that that carried over to the reasons for the discharge 3 weeks later. The evidence establishes that Pineda was obligated to check the Caterpillar's fluids. Respondent reasonably believed that the machine broke down as a result of that failure, resulting in a very expensive repair to a machine which was purchased new in 1989. There is no evidence of disparate treatment of Pineda in his discharge. *Roadway Package System*, 302 NLRB 961, 976-977 (1991); *T.N.T. Red Star Express*, 299 NLRB 894, 899 (1990).

The Act does not protect employees from discipline because they engage in union activity. The Act protects them from discriminatory discipline because of their union activity.

Accordingly, I find and conclude that Respondent has met its burden of proving that it would have discharged Pineda in the absence of his union activities. *Wright Line*, supra.

3. The alleged refusal to bargain

The appropriate collective-bargaining unit, as alleged in the complaint, and as agreed by the parties pursuant to a Stipulated Election Agreement, consists of:

All full time and regular part time pickers, sorters and machine operators, mechanic and welder employed by the Employer at its 172-06 Douglas Avenue, Jamaica, New York location, excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

As set forth above, on July 17, Local 813 Agents Jackson and Murray made a demand for recognition, and presented Respondent with a recognition agreement, which was rejected.

As discussed above, on July 13, 13 employees of Respondent signed authorization cards authorizing Local 813 to represent them. Respondent's payroll records for the period ending July 15 demonstrate that 22 employees were employed, including Baksh, Costa, and Gustman, whose inclusion may be at issue.²¹

Accordingly, Local 813 represented a majority of the unit employees on July 13.

The General Counsel argues that the unfair labor practices committed by Respondent are so serious and substantial in character as to warrant the issuance of a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Respondent asserts that it has a valid collective-bargaining agreement with Local 445, which precludes the issuance of a bargaining order herein.

The Validity of the Collective-Bargaining Agreement

On December 13, 1988, Local 445 was certified by the Board as the exclusive collective-bargaining representative of the employees of Regal in essentially the same unit found appropriate herein. The certification was based upon an election held pursuant to a Stipulated Election Agreement. Michael Reali testified that he engaged in negotiations with Local 445, and entered into a collective-bargaining agreement in December 1988, which expired in December 1991. A renewal agreement was executed in December 1991 which runs to December 1994. The contract appears regular in form, containing provisions for union security, wage raises, and hours of work. The contract also provided for, and employees received, paid holidays and vacations. Employees received wages in excess of the minimum set forth in the contract.

The contract requires the payment of health and welfare moneys to the Local 445 Health and Welfare fund, the deduction of dues from wages of employees, and the remission of such dues amounts to Local 445. Dues remittance reports were received in evidence which indicated that reports were sent by Local 445 to Respondent each month from January 1991 through April 1993, listing the names of employees, and setting

forth the amount of welfare and dues payable. Canceled checks were also received which showed payments for those months.²²

Respondent conceded that it did not deduct dues from employees' pay, but rather paid the dues directly to Local 445. Reali stated that that was the procedure followed in a company he had been employed by, and he considered it as a benefit to be given to the employees. Although the contract requires that dues deduction authorizations be signed by employees, Respondent did not produce any at hearing.

The employees testified that they were not aware of the existence of Local 445, or that that union represented them. Pineda, who was employed at the time of the Board election, denied knowing about the election or voting therein. Other employees testified that they never saw a representative from Local 445 until Griffin appeared at the shop after they had signed cards for Local 813.

Other employees stated that they were not informed that they were entitled to medical benefits, as provided in the contract. Respondent counters this by arguing that there was no showing that any employee was in need of medical benefits. That does not answer the question. The evidence supports a finding that the employees were not aware that Local 445 represented them, or that a collective-bargaining agreement regulated their wages, hours, or working conditions.

In sum, the record is devoid of any evidence that Local 445 concerned itself with the employees' hours or working conditions in any respect. *Don Mendenhall, Inc.*, 194 NLRB 1109 (1972). The employees did not even know that they were "represented" by a union or covered by a collective-bargaining agreement. *Weber's Bakery*, 211 NLRB 1, 12 (1974).

The employees who were allegedly covered by the agreement received no representation from Local 445, and were subject to working conditions unilaterally imposed by Respondent without any input from that union. *McDonald's Drive-In Restaurant*, 204 NLRB 299, 309 (1973). It further appears that Local 445 was not concerned with contract enforcement or with contract servicing, but was content to receive the dues and welfare payments for a few employees from Respondent. *McDonald's*, supra; *Bender Ship Repair Co.*, 188 NLRB 615, 616 (1971).

Thus, in the union reporting form covering the period June 1992, for the first time the following employees were added by Respondent to the form, and moneys paid in their behalf, notwithstanding that some of them were employed by Respondent for at least 9 months prior to June 1992: Hasan Abdool, Carmelo Calderon, Hugo Carrillo, David Baksh, who were on the payroll in September 1991, and Mario Ortiz and David Gustman who were hired in December 1991 and February, 1992, respectively. Obviously, Local 445 did not police its contract. Respondent was accordingly delinquent in its payment for these employees, and under these circumstances according to the contract, Local 445 was entitled to examine the books.

The contract also provides that notices of the discharge of employees must be sent to Local 445, but there was no evidence that this had been done with respect to Pineda.²³ Although the contract provides for the appointment of a shop steward, this provision has not been implemented.

²¹ There was testimony that Costa was a supervisor. Baksh and Gustman were pickers, but were salaried, unlike the other pickers. Aside from the 13 card signers, and Baksh, Costa, and Gutman, the other employees employed at that time were Abdool, Awan, Moran, Nunez, Veluppil, and Woolard.

²² Uncanceled checks dated April 1993 purported to show that sums due from December 1992 through April 1993 were being paid in April 1993.

²³ Respondent claims that the seven employees separated for failure to produce immigration documents were laid off.

The payment by Respondent of dues for its employees has long been held to constitute unlawful assistance in violation of Section 8(a)(1) and (2) of the Act. *Allied Erecting Co.*, 270 NLRB 277 (1984); *Sweater Bee by Banff, Ltd.*, 197 NLRB 805 (1972).

Accordingly, I find that the contract between Respondent and Local 445 was not an effective or real collective-bargaining relationship between the parties, nor was it meant to be, nor did they believe that it was such. *Ace-Doran Hauling Co.*, 171 NLRB 645, 646 (1968). It was treated by them as a convenient arrangement to be utilized when another union indicated an interest in representing Respondent's employees.

Therefore, I find that the collective-bargaining agreement between Respondent and Local 445 does not preclude the issuance of a *Gissel* bargaining order.

The Propriety of a Bargaining Order

In *Gissel*, supra, the Supreme Court held that bargaining orders are appropriate in "less extraordinary" cases marked by "less pervasive" unfair labor practices where the employer's unlawful conduct has a "tendency to undermine [the union's] majority strength and impede the election processes," and the union at one time had majority support among the unit employees. 395 U.S. at 614 (1969).

The Supreme Court held in *Gissel*, supra, that where

The possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

In determining whether a bargaining order is appropriate, the Board examines the severity of the violations and the effects that the unfair labor practices would have on the holding of a rerun election. *Sheraton Hotel Waterbury*, 312 NLRB 304 (1993).

Here, I have found that Respondent interrogated employees, threatened its employees with discharge, warned them that they could not join Local 813, and hired additional employees in order to pack the unit and deprive the employees of representation by Local 813.

It must be observed that Respondent began a campaign of interrogation, threats and discharges as soon as it became aware of its employees' interest in Local 813. Its campaign was designed to undermine that union's strength. *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992).

It is very significant that many of the violations were serious in nature. Threats of job loss through plant closure and discharge because of union activity is among the most flagrant kind of interference with Section 7 rights and is more likely to destroy election conditions, and to do so for a longer period of time than other unfair labor practices. *Sheraton*, supra.

In addition, the unlawful discharges of the seven employees, which comprised half the bargaining unit, and which threatened the livelihood of the employees, are likely to have a lasting impact which is not easily erased by the mere passage of time or the Board's usual remedies, especially given the small size of the bargaining unit. *Q-1*, supra.

Thus, the possibility of erasing the effect of the Respondent's actions and ensuring a fair election by the use of traditional remedies is slight. Employee sentiment, once expressed

through cards, is better protected by a bargaining order. *Interstate Truck Parts*, 312 NLRB 661 (1993).

Because I have recommended that a bargaining order issue, it also follows that I will recommend that the election be set aside, that Case 29-RC-8020 be dismissed, and that all proceedings in connection therewith be vacated. *Yerger Trucking*, 307 NLRB 567, 578 (1992). However, in the event that it is ultimately determined that a bargaining order is not warranted, I will discuss the objections and challenges.

4. The representation case

The tally of ballots following the election conducted on October 30, showed that 4 votes were cast for Local 813, 2 votes were cast for Local 445, no votes were cast against representation, and there were 24 challenged ballots.

In light of my findings, above, that employees who were hired beginning in August 1992, were hired in an effort to pack the unit in violation of Section 8(a)(1) of the Act, I will recommend that the challenges to the ballots of the following employees be sustained: Roy Dortch, Richard Ferraro, Julio Flores, Jose Gomez, Carlos Hernandez, Alex Martinez, Damon Mason, Derrick Mason, Alejandro Montalvo, Roberto Montalvo, Dimas Nunez, Roberto Peraza, Jose Pina, Ahmed Sagheer, Nelson Toledo, Jose Toribio, and Giro Valentin.

I will recommend that the challenges to Hasan Abdoal, David Baksh, and David Gustman be overruled because they were hired before Local 813 began its organizational campaign, and thus were not hired in an attempt to influence the election. Moreover, there was uncontradicted testimony that they were unit employees.

Inasmuch as I have found that Joel Mancilla Chinchilla, Julio Del Cid, and Nery Perez were discharged unlawfully in violation of the Act, I will recommend that the challenges to their ballots be overruled, and that those ballots be opened and counted. The challenge to the ballot of Edgar Pineda was withdrawn with the approval of the Regional Director. His ballot should be opened and counted.

The objections to conduct affecting the results of the election, filed by Local 813, generally track the complaint allegations with respect to conduct occurring between the time the petition was filed, and the time of the election.²⁴

In light of my above findings that Respondent (a) discharged seven employees in violation of the Act, (b) denied Local 813 access to its facility and employees to campaign while allowing Local 445 such access, (c) by hired additional employees in order to influence the outcome of the election, and (d) threatened and interrogated employees, I conclude that the objections should be sustained and the election set aside.

CONCLUSIONS OF LAW

1. The Respondent, Regal Recycling Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 813, International Brotherhood of Teamsters, AFL-CIO, and Local 445, Laborers International Union of North America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By interrogating employees concerning their union activities, Respondent violated Section 8(a)(1) of the Act.

²⁴ No evidence was presented as to the complaint allegation that Rios prevented an employee from voting in the election, and I therefore recommend that it be dismissed.

4. By threatening employees with discharge for criticizing Local 445, Respondent violated Section 8(a)(1) of the Act.

5. By threatening to demand to see the immigration papers of its employees in the context of a meeting at which it sought to discourage membership in Local 813, Respondent violated Section 8(a)(1) of the Act.

6. By threatening to close its shop if its employees selected Local 813, Respondent violated Section 8(a)(1) of the Act.

7. By informing its employees that they already had a union, and that they should not join Local 813, Respondent violated Section 8(a)(1) of the Act.

8. By hiring additional employees to influence the outcome of the election, Respondent violated Section 8(a)(1) of the Act.

9. By denying access to its employees and facility to Local 813, while at the same time providing such access to Local 445, Respondent violated Section 8(a)(1) and (2) of the Act.

10. By issuing a warning to its employee Edgar Pineda on November 19, 1992, Respondent violated Section 8(a)(1) and (3) of the Act.

11. By discharging employees Maynor Lima Bobadillo, Hugo Carrillo, Mario Carrillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez because of their activities in behalf of Local 813, Respondent violated Section 8(a)(1) and (3) of the Act.

12. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time pickers, sorters and machine operators, mechanic and welder employed by the Employer at its 172-06 Douglas Avenue, Jamaica, New York location, excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

13. Since July 17, 1992, Local 813 has been the exclusive collective-bargaining representative of the employees set forth in the appropriate collective-bargaining unit, above.

14. By the conduct set forth in paragraphs 3–11, above, Respondent has undermined the majority status of Local 813, and has precluded any likelihood that a fair election could be held.

15. Respondent has violated Section 8(a)(5) and (1) of the Act since July 17, 1992, by refusing to recognize and bargain with Local 813 in the above-defined collective-bargaining unit.

16. The unfair labor practices found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

17. Respondent has not violated the Act in any other respect as alleged in the complaint as to which no violations have been found.

THE REMEDY

Having found that Respondent has engaged in unlawful conduct under the Act, I will recommend that it cease and desist therefrom, and take certain affirmative action which is necessary to effectuate the policies of the Act.

Having found that Local 813 represented an uncoerced majority of Respondent's employees in a unit found appropriate for purposes of collective bargaining on July 17, 1992, the day the Respondent received the union's request for recognition, and continued to enjoy majority support when Respondent began committing unfair labor practices, it is recommended that a bargaining order issue effective July 17, 1992, and that Respondent be ordered to post an appropriate notice to employees.

In the event that it is ultimately determined that a bargaining order is not warranted, having sustained certain objections to the election held on October 30, 1992, it is recommended in that circumstance that the results of the election be overturned and a second election directed.

Regarding the seven unlawfully discharged employees, Respondent argues that no reinstatement or backpay remedy may be ordered because they have not proven that they are entitled to lawful residence in the United States. In fact, Joel Chinchilla, Julio Del Cid, and Nery Perez testified that they had done nothing to apply for legal status.

The Board's normal remedy in cases involving discharges includes requiring the offer of immediate reinstatement and back pay. The Board has held that such undocumented aliens are entitled to an offer of reinstatement and back pay unless Respondent could prove their illegal presence by means of a final deportation order of the Immigration and Naturalization Service. *Del Rey Tortilleria*, 302 NLRB 216 (1991), revd. 787 F.2d 1118 (7th Cir. 1992). Since Respondent has not met that burden, I will recommend that the Board's normal remedies apply.

The amounts to be paid to the unlawfully discharged employees shall be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]